IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-796

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, et al.,

Petitioners

v.

CEDAR COAL COMPANY and SOUTHERN OHIO COAL COMPANY,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals For The Fourth Circuit

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Cases Cited

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Petitioners, International Union, United Mine Workers of America; District 17, United Mine Workers of America; Local Union 1766, United Mine Workers of America; District 31, United Mine Workers of America; and Local Union 1949, United Mine Workers of America, respectfully pray that a writ of certiorari issued to review part of the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on July 6, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at 560 F.2d 1154 and is appended at App. A., pp. A-1 to A-42, infra. The District Courts for the Southern and Northern District of West Virginia did not render opinions.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 6, 1977. Petitioners' timely petition for rehearing was denied by order filed September 6, 1977, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the claim of coal operators that the honoring of a stranger picket line by coal miners is a breach of a judicially created implied no-strike duty, can be arbitrated when: (1) the grievance and arbitration machinery is not open to any coal operator grievances and (2) the collective bargaining agreement sued upon neither contains an express no strike duty nor mentions picket lines.

STATUTE INVOLVED

This case involves § 301(a) of the Labor Management Relations Act (LMRA), 61 Stat. 156, 29 U.S.C. 185(a), appended at App. B., p. B-1, infra.

STATEMENT OF THE CASE

1. Federal Jurisdiction

These cases arose when respondents Cedar Coal Company and Southern Ohio Coal Company ("coal operators")[1] invoked the jurisdiction of the District Courts

[1]The coal mines of respondent Cedar Coal Company are located in Kanawha County in the Southern District of West Virginia. Cedar filed case no. 76-0460 in the Southern District of West Virginia and case no. 76-1785 in the Court of Appeals. Hereinafter that case will at times be referred to as "the Cedar Coal case". Respondent Southern Ohio Coal Company operates mines in Marion County, West Virginia in the Northern District of West Virginia. Southern Ohio filed case no. 76-167-E in the Northern District of West Virginia and case no. 76-1846 in the Court of Appeals. Hereinafter at times that case will be referred to as the "Southern Ohio Coal case". Ohio Power Company is the parent of Southern Ohio and although petitioners do not believe it is a proper party to this case, it is named in accordance with recommended practice.

under § 301, LMRA, to secure injunctive relief and damages on account of work stoppages at their mines. The stoppages were alleged to have resulted from the refusal of miners employed by the coal operators to cross foreign picket lines set up by persons not employed at the mines.

2. The Parties

The petitioner United Mine Workers of America labor organizations ("the unions") represent for collective bargaining and other purposes the coal miners employed by the coal operators. The unions and the coal operators are parties to the National Bituminous Coal Wage Agreement of 1974.

3. Proceedings Below and Factual Background

In the summer of 1976 widespread picketing prompted by political protest[2] resulted in the closing of coal mines of the respondent coal operators. The single collective bargaining agreement in question does not contain a written no-strike agreement or any provision concerning picket lines. The coal operators alleged breach of the implied in law no strike clause and sought injunctions

[2]The picketing "developed into protests over real or imagined wrongs by the federal court" as found by then District Judge Hall in the Cedar Coal case. The facts and allegations of Cedar Coal case are stated in Part II of the opinion of the Court of Appeals, A-9 to A-11 infra, the facts of the Southern Ohio Coal case are stated at Part III of the same opinion, A-12 to A-14.

Another case involving Cedar Coal and Local Union 1759, United Mine Workers of America, United States District Court for the Southern District of West Virginia No. 76-0440, Court of Appeals No. 76-1793, is not the subject of this petition. For the record it should be noted that the petitioners have consistently taken clear exception to the characterization by the Court of Appeals of the facts of that case, as stated in Part I of the opinion of the Court of Appeals (A-3 to A-9). The District Court never made any reviewable determination as to the cause of the stoppage at Local 1759. The statements in Part I of the opinion of the Court of Appeals are not based on any findings of fact but are based upon affidavits which were presented, in most cases, initially to the Court of Appeals ostensibly for the purpose of ruling on the Rule 8, FRAP, motion for injunction pending appeal.

and damages. The District Court for the Southern District of West Virginia in the Cedar Coal case denied interlocutory relief and dismissed the complaint of Cedar Coal Company. The District Court for the Northern District of West Virginia denied the motion of Southern Ohio Coal for a preliminary injunction. Both coal operators appealed to the Court of Appeals for the Fourth Circuit.[3] The opinion was issued nearly eleven months after oral argument and was written by the only active Judge of the Court of Appeals on the panel.[4]

The Court of Appeals discussed principally the question of *Boys Markets*[5] injunctive relief. (A-31 to A-40) This petition does not concern the denial of injunctive relief. It is only concerned with the surprising and unexplained directive by the Court of Appeals that on remand of the cases the district courts, as a prelude to the damage claims, must "forthwith" direct arbitration of the central question of whether or not the refusal of the miners to cross the picket lines was a breach of contract. Item IX of the opinion, (A-40 to A-41). Petitioners sought rehearing primarily on the grounds that (i) the directive to remand was contrary to well established principles of federal labor law, discussed infra, and (ii) none of the coal operators expressly sought or argued in favor of a remand to arbitration without a *Boys Markets* injunction. After the petition for rehear-

[3]Although the operators' motions for immediate injunctive relief were denied, the appeals were accorded expedited treatment and oral argument was held within weeks after the cases were appealed.

[4]All but two active Judges of the Fourth Circuit disqualified themselves from the appeals. See footnote 1 of Order denying rehearing en banc filed by the Court of Appeals on September 6, 1977. The merits of the appeal were actually heard by one active Judge of that court, the Honorable Emory E. Widener, and by two Judges specially designated, the Honorable Pierce Lively, United States Circuit Judge for the Sixth Circuit and the Honorable John A. MacKenzie, United States District Judge for the Eastern District of Virginia.

[5]*Boys Markets* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970).

ing was denied, petitioners obtained a stay and initiated this proceeding.

REASON FOR GRANTING THE WRIT

I. The Decision Below Conflicts Directly With This Court's Holdings in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) and in *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976).

The contract sued upon does not contain a written no strike clause nor does it contain any promise concerning picket lines. The grievance and arbitration provisions of the contract are appended at App. C., pp. C-1 to C-8, infra. Accordingly, the coal operators' sole basis for seeking strike damages is breach of a no-strike clause implied from an agreement to arbitrate on the basis of the federal labor policies favoring arbitration by this Court in *Lucas Flour*.[6]

Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), states the primary rule that it is the duty of *the courts* to determine "whether the reluctant party has breached his promise to arbitrate", because, "arbitration is a matter of contract and a party cannot be required to submit

[6]*Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). In *Lucas*, this Court held that a union, even in the absence of an express "no strike" agreement, could be liable for damages—but only in the limited situation of:

> . . . a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration . . .
>
> • • •
>
> What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory termination arbitration.

369 U.S. 105-6. This Court has consistently applied this confined formulation of the implied no strike duty. *Drake Bakeries* v. *Local 50, Bakery Workers*, 370 U.S. 254, 262 n. 8. (1962); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 248 n. 16 (1970); *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 381 and 384 (1974); and *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397, 407, 408 n. 10 (1976).

to arbitration any dispute which he has not agreed to so submit".[7] The Court of Appeals departed from this principle when it remanded to arbitration, rather than decide for itself, as required by *Atkinson,* the question of whether the *Lucas Flour* implied no-strike duty had been breached. Certiorari is sought primarily on the basis of that departure.

This departure from the rule of *Atkinson* is documented by the absence of any analysis by the Court of Appeals of the two secondary questions which must, according to *Atkinson,* be evaluated and answered by the Courts when deciding the primary question. The two secondary questions applied to this case are: (1) whether the "reluctant part[ies]", the unions, were bound to arbitrate the *employers'* claim and (2) whether the refusal to cross picket lines created an arbitrable issue. 370 U.S. at 241. The remand to arbitration was directed by the Court of Appeals without consideration of (i) those secondary questions or (ii) the primary question of whether the unions had breached any agreement to arbitrate.

[7]The full quotation is:

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined *by the court* on the basis of the contract entered into by the parties. 'The Congress has by § 301 of the Labor-Management Relations Act [29 U.S.C. 185], assigned *the Courts* the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). See also United Steelworkers v. American Mfg. Co., 363 U.S. 564, 570-571 (1960) (concurring opinion).

Atkinson, supra, 370 U.S. at 241 (emphasis added).

A. Since the Union Did Not Agree to Arbitrate Claims of the Coal Operators, the Directive to Arbitrate Squarely Conflicts With This Court's Holding in *Atkinson* That a Union Should Not Be Required to Arbitrate Employer Claims in the Absence of an Agreement (Not Present Here) To Do So.

The reality of arbitration of only employee claims under the UMWA contract was restated succinctly by Southern Ohio's personnel manager. When asked if Southern Ohio "contemplated filing a grievance", he replied "[n]o, the company doesn't file grievances as you well know".[8]

Atkinson and all the decisions applying it examine the wording of the grievance and arbitration machinery in a labor agreement before deciding whether the party resisting arbitration should be required to submit a dispute to arbitration. Although the term "grievance" was broadly defined, this Court noted (i) the wording limiting the initiation and processing of grievances to the "individual employee" and (ii) the fact that it was only those individual employee grievances which were eligible for arbitration and concluded:

> There is not a word in the grievance and arbitration article providing for the submission of grievances by the company . . . At no place in the contract does the union agree to arbitrate at the behest of the company. The company is to take its claims elsewhere, which it has now done.

Atkinson, supra, 370 U.S. at 243. *Atkinson* held that

[8]Testimony of Forrest Skidmore in Southern Ohio Case (see footnote 1, supra), p. 35 of transcript of hearing of July 26, 1976. The Court of Appeals specifically recognized that Local 1949 did not refuse to arbitrate. ". . . [A]fter evidence was taken, plaintiffs' counsel conceded there had been no refusal [by the union] to arbitrate." A-13.

the strike damage question should be determined solely by the Courts.[9]

In this case, as the Court found in *Atkinson*, the arbitration agreement is not susceptible to a construction that the parties agreed to arbitrate employers claims for strike damages against the union. The grievance and arbitration procedure in the UMWA contract are "employee-oriented". The language of the procedure itself is limited to complaints of "the employee" who has the right to "make his complaint to his immediate foreman" at step 1. At step 2, the grievance is identified as "the Employee's grievance". (C-3)[9a] Steps 3 and 4 of the grievance procedure and arbitration at step 5 are limited to complaints which are processed at steps 1 and 2.[10] The total absence of any reference to employer grievances in the UMWA contract is also decisive. *Atkinson*, 370 U.S. at 243.[11]

[9]By contrast, in *Drake Bakeries* v. *Local 50, Bakery Workers*, 370 U.S. 254, 257-8 (1960), decided the same day as *Atkinson*, the grievance procedure stated that "either party" had the right to submit a matter to arbitration. The citation of *Drake* by the Court of Appeals and the omission of any reference to the companion *Atkinson* case (see p. A-41, infra) suggest that the Court of Appeals either thought (i) that the labor agreement in question provided for the processing of employer grievances or (ii) that the court did not correctly identify the proponent of the unexplained grievance.

[9a]Pursuant to *Atkinson*, 370 U.S. at 243, leading decisions of the Court of Appeals have recognized that, despite broad initial language of a grievance procedure, the scope of the grievance procedure is limited to complaints which can actually be processed under the language of the grievance procedure. *Friedrich* v. *Local 780, Electrical Workers*, 515 F.2d 225, 227-8 (5th Cir. 1975); *Bliss & Laughlin Industries* v. *Int. Assn. of Machinists*, 513 F.2d 987, 991-2 (7th Cir. 1955).

[10]The Courts of Appeals have also properly recognized that complaints which can be processed at the later steps of grievance and arbitration are only those which are processed at the earlier steps. *G. T. Schjeldahl Co.* v. *Lodge 1680 Machinists*, 393 F.2d 502, 505 (1st Cir. 1968); *Friedrich*, supra, note 9a, 515 F.2d at 229. Even though both parties to the UMWA contract can apply to an Arbitration Review Board, which exercises discretionary jurisdiction over arbitration decisions, each party is nevertheless applying for review of the "employees' grievance". See C-3 and *Vulcan-Cincinnati, Inc.* v. *Steelworkers*, 289 F.2d 103, 108 (6th Cir. 1961).

The *Steelworker's Trilogy*[12] "presumption of arbitrability" does not make any strike damages[13] claims in this

[11]The cases which order arbitration of strike damage questions uniformly do so because the *employer* can file a grievance. For example, *all* of the post *Steelworkers Trilogy* (1960) (see note 12, infra) decisions of the Courts of Appeals cited in the Annotation, "Matters Arbitrable Under Arbitration Provisions of Collective Labor Contract, § 13 Breach of Contract Generally, Damages", 24 ALR 2nd 752, as supplemented *Later Case Service* (July 1977 Supp.), which expressly rule on the proper forum for strike damage questions order arbitration of strike damage questions on the basis of a finding of a grievance procedure open to both employer and employee. *H. K. Porter Co.* v. *Steelworkers*, 400 F.2d 691, 29 ALR 3d 679 (4th Cir. 1968); *Yale & Towne Mfg. Co.* v. *International Ass'n Machinists*, 299 F.2d 882, 885 (3rd Cir. 1962) (E.D. Pa. 1961); *Jefferson City Cabinet Co.* v. *International Electrical Workers*, 313 F.2d 231, 233-4 (6th Cir. 1963); *Minnesota Joint Board, Clothing Workers* v. *United Garment Manufacturing Co.*, 338 F.2d 195, 198-9 (8th Cir. 1964); *Scalzitti Co.* v. *Operating Engineers Local 150*, 351 F.2d 576, 577 (7th Cir. 1965); *General Dynamics Corp.* v. *Industrial Union of Marine Workers*, 469 F.2d 848, 853-4 (1st Cir. 1972); *Howard Electric Co.* v. *Electrical Workers*, 423 F.2d 164, 167 (9th Cir. 1970). In *E. T. Simonds Construction Co.* v. *Hod Carriers*, 315 F.2d 291 (7th Cir. 1962), arbitration of strike damages was ordered because the union waived its right to a judicial stay of arbitration. *Valmac Industries* v. *Meatcutters*, 519 F.2d 263, 267-8 (8th Cir. 1975), cited at opinion, A-41, did not decide the question of the proper forum for the strike damage question. Neither party objected to the arbitration forum (by requesting a stay, etc.) nor to the arbitrability of the strike damage question. The employer essentially claimed that arbitration was unnecessary since it believed the district court had already decided the merits of breach of contract question. The court held that arbitration was still essential. Also, the arbitrability ruling in *Valmac* was in effect reversed by this Court in *Food Handlers Local 425* v. *Valmac Ind. Inc.*, 428 U.S. 910 (1976).

By contrast, *all* of the similar circuit decisions in the same annotation hold the strike damage claims are properly before a court when the grievance procedures are "employee-oriented". *Affiliated Food Distributors, Inc.* v. *Local 229, Teamsters*, 483 F.2d 418, 420-1 (3rd Cir. 1973), cert. denied 415 U.S. 916; *Bliss & Laughlin Industries* v. *International Association of Machinists*, 513 F.2d 987, 990 (7th Cir. 1975); *Los Angeles Paper Bag Co.* v. *Printers District Council 2*, 345 F.2d 759 (9th Cir. 1965); *G. T. Schjeldahl Co.* v. *Lodge 1680 Machinists*, 393 F.2d 502, 505 (1st Cir. 1968); *Vulcan-Cincinnati Inc.* v. *Steelworkers*, 289 F.2d 103 (6th Cir. 1961); *Friedrich* v. *Local 780, IUE*, 515 F.2d 225, 230 (5th Cir. 1975).

[12]*Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

[13]As used hereinafter, the term "strike damages" refers to all issues arising from a claim by an employer against the union for a strike. These issues include breach of contract, the question the Court of Appeals remanded to arbitration, and issues such as union responsibility or the amount of damages which are not the subject of the remand order.

case arbitrable, because there is no "doubt", to which the presumption might apply, that the coal operators can not file grievances.[14] Therefore, the conclusion this Court reached in *Atkinson*, immediately after citing the *Steelworkers Trilogy*, applies herein as well. *Atkinson* concluded that the contract was:

> . . . not susceptible to a construction that the . . . [reluctant party] was bound to arbitrate [a] claim for damages . . . for breach of the undertaking not to strike.

370 U.S. at 241. Since, as documented above and proclaimed by Southern Ohio's personnel manager, "the company doesn't file grievances", the directive of the Fourth Circuit to arbitrate the employer's claims conflicts squarely with *Atkinson*.

B. The Directive to Arbitrate the Question of Breach of an Implied No Strike Clause Directly Conflicts With the Holding of This Court in *Buffalo Forge* That an Implied No Strike Clause Provides "No Possible Basis for Implying From the Existence of an Arbitration Clause a Promise Not to Strike . . .". 428 U.S. at 408.

Buffalo Forge conclusively establishes the non-arbitrability of any claim of breach of an implied no strike clause. Keeping in mind that the contracts in *Buffalo Forge* contained an express no-strike clause, this Court stated:

> Thus, had the contract not contained a *no-strike*

[14]The Courts of Appeals have likewise ruled that the presumption of arbitrability does not apply to make employer claims for strike damages arbitrable when collective bargaining agreements do not provide for the processing of employer grievances. *Affiliated Food Distributors, Inc.* v. *Local 229, Teamsters*, 483 F.2d 418, 420 (3rd Cir. 1973); *Bliss & Laughlin Industries*, supra, note 11, 513 F.2d 989-90; *Friedrich*, supra, n. 11, 515 F.2d at 229.

> *clause*[15] . . ., there would have been no possible basis for implying from the existence of an arbitration clause a promise not to strike which could have been violated by the sympathy strike in this case. *Gateway Coal Co.* v. *Mine Workers*, [414 U.S. 368] 382 (1974)].

428 U.S. at 408 text at n. 10. Footnote 10 of *Buffalo Forge*, not mentioned in the opinion of the Court of Appeals, held that Courts of Appeals with similar UMWA contracts before them were "wrong" "to the extent" they assumed "a mandatory arbitration clause *implies* a commitment not to engage in sympathy strikes . . ." (emphasis added).[16] The dissent in *Buffalo Forge* specifically referred to the above text and, after citing footnote 10, agreed: "in particular, an implied no-strike clause does not extend to sympathy strikes". 428 U.S. at 425 n. 17."[17]

[15]Underscoring added. Although the underscored portion of *Buffalo Forge* did not say "express no-strike clause", that portion of the opinion could only mean an express no-strike clause. All of the circuit cases cited in the text of footnote 10 (428 U.S. at 408) involve contracts with *implied* no-strike clauses. The purpose of footnote 10 apparently is to explain why the stoppage in *Buffalo Forge* could not be enjoined under the authority of either *Gateway Coal Co.* v. *UMWA*, 414 U.S. 368 (1974) or *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). The Court pointed out that *Lucas* and *Gateway* concerned the implied no-strike duty. It should be kept in mind that the arbitrability of the picket line question was conceded by the unions in *Buffalo Forge*. Petitioners have steadfastly maintained that the stoppages herein were not over arbitrable matters. Although the Court of Appeals does refer to footnote 9 of *Buffalo Forge*, companion to footnote 10, it did not refer to footnote 10. A-33, A-35, A-40.

[16]Petitioners were unable to locate any precedent awarding damages for a sympathy strike on the basis of breach of an implied *Lucas Flour* no-strike clause. Both of the labor agreements before this Court in *Atkinson* and *Drake Bakeries* contained express no-strike agreements. *Drake*, supra, 370 U.S. at 259, n. 4; *Atkinson*, supra, 370 U.S. at 241, n. 1. All cases cited at note 11, supra, involved strike damage liability claims based on express no-strike clauses. None of the decisions involved implied no-strike clauses.

[17]Indeed, as is shown in Part II hereof, the Third Circuit has directly ruled that the refusal to cross picket lines does not under the UMWA contract give rise to a damage action for breach of the implied no-strike clause and the Sixth Circuit has made the same ruling in principle. *U. S. Steel Corp.* v. *UMWA*, 548 F.2d 67, 73 (1976) cert. denied, 45 USLW 2318 (June 13, 1977); *Southern Ohio Coal Co.* v. *UMWA*, 551 F.2d 695, 704 (6th Cir. 1977), cert denied, 46 USLW 3219, October 4, 1977 (No. 76-1565).

In addition to the impossibility of directing arbitration of claims which are themselves not arbitrable, the order of the Court of Appeals to arbitrate on remand forces the parties to arbitrate a public right in a private forum. In the absence of an agreement to the contrary, not present on this record, arbitration, is reserved for private right questions.

Any duty to cross picket lines (which is denied) would only originate from the *Lucas Flour* implied no-strike clause, discussed at note 6, supra. That duty exists solely by operation of law from federal labor statutes, §§ 203 (d) and 301 of Taft-Hartley, 29 U.S.C. 173 (d) and 185, and in particular on policies created under § 301[19] by this Court. It has no basis in bargaining history, contractual language or prior practice. Hence, there is no arbitral subject matter upon which an umpire could possibly determine the nature of the alleged duty.

> The specialized confidence of arbitrators pertains primarily to the law of the shop, not to *the law of the land* . . . [T]he *resolution of statutory . . . issues is a primary responsibility of the courts* . . .

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (emphasis added).[20]

In sum, the remand order of the Court of Appeals

[19] *Textile Workers* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957), found § 301 to be authority for the federal courts to fashion and apply *federal substantive law* from the policy of the national labor laws. Not only *Lucas Flour*, and *Gateway Coal*, supra note 6, but also, the *Steelworkers Trilogy*, supra note 12, *Drake* and *Atkinson*, supra note 9, and *Boys Markets*, supra note 5, are federal substantive law created thereunder.

[20] Notwithstanding the central role of labor arbitration, the Court recognized that the "arbitrable processes [are] comparatively inferior to the judicial processes . . .". *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). *Gardner* also stressed the limited judicial review of arbitration decisions. 415 U.S. at 34. Arbitration decisions are not reviewable on the merits but only subject to successful judicial review when they are arbitrary, fraudulent or without authority.

conflicts with *Atkinson*, supra, because it directs arbitration by a *party* who did not agree to arbitrate. The directive also conflicts with the square holding of *Buffalo Forge* that the *claim* is not arbitrable. Certiorari should, therefore, be granted because the Court of Appeals has directed arbitration contrary to these fundamental rulings that arbitration should be ordered only when the reluctant party agreed to arbitrate and, then, only as to claims which both parties agreed to arbitrate.

II. The Decision Below Presents an Important Statutory Question on Which the Courts of Appeal are in Direct Conflict.

In the Cedar Coal case the action of the district court in dismissing the complaint, including the coal operator's damage claim, was found to have been an error by the Court of Appeals. The Court of Appeals "*assumed* the arbitrability of the question of whether or not [the Cedar Coal local] might be required to cross . . ." the picket lines. Part VIII (d) of opinion, A-39 (emphasis added). That assumption, coupled with the directive to arbitrate, amounts to a ruling that the coal operator claiming a sympathy strike has a cause of action for breach of the *Lucas Flour* implied no strike clause—at least pending a judicially directed determination of arbitrability, and hence actionability, by the arbitrator. The holding conflicts squarely with a decision of the Third Circuit, under a substantially identical UMWA contract,[21] that the refusal to cross picket lines does not give rise to a damage action for breach of the implied

[21] *U.S. Steel* involved the 1968 UMWA agreement. The scope of the arbitration clause language is quoted by the Third Circuit, 548 F.2d at 70, and is identical for all relevant purposes to the language in the contract before this court. See C-3 to C-5.

no-strike clause. *U. S. Steel* v. *UMWA*, 548 F.2d 67, 73 (1976), cert. denied 45 USLW 2318 (June 13, 1977)."

The ruling of the Fourth Circuit also conflicts in principle with a recent ruling of the Sixth Circuit upholding the denial of injunctive relief for a sympathy strike. The crux of the Sixth Circuit's decision was that the stranger picket line question was not "arbitrable" and hence not enjoinable. *Southern Ohio Coal Co.* v. *UMWA*, 551 F.2d at 703, 715 (6th Cir., February 11, 1977), cert. denied 46 USLW 3219 (October 4, 1977)." This conflict is particularly compelling and needful of resolution because it involves the same stoppage, some of the same parties[24] and the same contract as the decision of the Fourth Circuit.

The holdings of the Third and Sixth Circuits, which were decided well before the decision of the Fourth Cir-

[22]The Third Circuit held:

> Had the contract in the instant case contained a no-strike clause, the issue whether the sympathy strike violated the union's no-strike undertaking might have been arbitrable. In the absence of the no-strike clause, however, *Buffalo Forge* establishes that there is "no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike" in this case. . . . Quite simply, the work stoppage at the U. S. Steel mine presented no arbitrable issue.

548 F.2d at 73.

[23]The Sixth Circuit held:

> *Buffalo Forge* also requires us to reject the Company's contention that the arbitration clause in the collective bargaining agreement is broad enough to encompass the issue of whether the union had contracted away the employees' right to honor picket lines. . . . The Bituminous Coal Wage Agreement of 1974 does not contain an express no-strike clause so the issue of the union's right to refuse to cross a picket line is not even arguably arbitrable. . . . [T]he unions' refusal to cross the stranger picket line did not involve an arbitrable dispute . . ."

551 F.2d at 704. Although the determination of non-arbitrability was made as to the issue of *enjoinability*, it also means that the work stoppage caused by pickets is not *actionable* under *Lucas Flour* as the strike would not be over an arbitrable matter. See note 6, supra.

[24]The International Union, United Mine Workers of America and coal operator, Southern Ohio Coal Company are parties in both cases.

cuit of July 1977,[25] are expressly based on this Court's ruling in *Buffalo Forge*. Since all of these holdings attempt to apply the federal labor policies derived from § 301 of LMRA the decision of the Fourth Circuit presents an important statutory question on which the Courts of Appeals are in direct conflict.

III. The Conflicts of the Decision of the Court of Appeals for the Fourth Circuit with Decisions of This Court and With Decisions of Other Courts of Appeals Creates a Substantial and Serious Hindrance to the Effective Administration of Justice.

This petition seeks review of only one of many errors[26] committed by the Court of Appeals.[27] The directive to arbitrate the *Lucas Flour* question, if allowed to stand is an anomaly (see parts I and II, supra) in an actively litigated area of federal labor law. Work stoppages resulting from picketing in the coal industry are a matter of numerous damage claims pending within the jurisdiction of the Fourth Circuit and other circuits.[28] For example, the nearly 100 picketing cases [29] pending in the District Courts of West Virginia would, if they were in the Third or Sixth Circuits, be the subject of dispositive motions.

The opinion of the Court of Appeals requires remand

[25]Both decisions were heavily relied upon by petitioners in briefs presented to the Court of Appeals after argument and before rehearing was denied.

[26]Petitioners believe that all of the rulings of the Court of Appeals in the companion case involving Local Union 1759 (A-16, A-31, and A-37) as well as the rulings concerning appellate jurisdiction (A-15) and enjoinability (A-39) at the Cedar/Local 1766 mines are in error.

[27]Certiorari is not sought on those issues due to a variety of factors: (i) the contract sued upon has expired, (ii) the unusual circumstances which apparently caused the stoppages are unlikely to ever recur, (iii) the state of the record, and (iv) the circumstance that these errors can be raised, consistent with judicial economy and probably without undue hardship on petitioners, at the time of final judgment.

[28]In addition to the Fourth, Third and Sixth Circuits, similar litigation is pending in the Seventh Circuit.

[29]See Appendix D, pp. D-1 - D-3, and footnote 30, infra.

of these cases to the uncertainties of arbitration for determination of the *Lucas Flour* question. District Courts in the Fourth Circuit now faced with coal operator requests for remands to arbitration[30] may be required by the decision of the Fourth Circuit to direct, erroneously, remands to arbitration even though federal courts in the neighboring Sixth and Third Circuits would dismiss the lawsuits. Since the unmistakable error will inevitably pervade and infect this multitude of cases, it must be corrected sooner or later.

In addition to burdening the judiciary, erroneous remands to arbitration will overload the arbitration process, which is, after all, the forum which every case cited herein is attempting to promote. Arbitration is ill equipped and ill suited, especially in the coal industry, to process strike damage claims, which can amount, as is shown above at note 30, to multi-million dollar claims. The uncertainty created by the fundamental and clear cut error of federal labor law committed by the Fourth Circuit can only be, and should be, removed by this Court in the interest of the prompt and economic termination of these two and a multitude of similar cases.

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[30]One case now pending before the Fourth Circuit, set for oral argument on December 7, 1977, involves verdicts for work stoppages caused by picketing in excess of $458,000. *UMWA et al.* v. *Carbon Fuel*, No. 77-1422. The brief of the coal operator, Carbon Fuel Company, specifically seeks a remand to arbitration of the above noted stoppages and "[u]pon receipt of the arbitrator's opinion, the district court can then either reinstate or vacate its judgments [of more than $485,000] as to the strikes involved." Brief filed on or about August 4, 1977 at p. 13. In another claim, this one for 2.5 million dollars in damages, substantially identical to *Carbon Fuel*, now pending on summary judgment before the Southern District of West Virginia, the operator has requested remand to arbitration identical to that sought in the *Carbon Fuel* case. *Youngstown Mines Corporation* v. *UMWA, et al.*, U.S.D.C., S.D. W. Va. Civil No. 75-0256 CH, Motion for Partial Summary Judgment and Order to Arbitrate filed, on or about October 10, 1977, p. 5.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1785

CEDAR COAL COMPANY,
a Corporation

v. *Appellant*

UNITED MINE WORKERS OF AMERICA; et al.

Appellees

BITUMINOUS COAL OPERATORS'
ASSOCIATION, INC.

Amicus Curiae

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON. K. K. HALL, DISTRICT JUDGE.

No. 76-1793 (also Misc. No. 76-8239)

CEDAR COAL COMPANY,
a Corporation

v. *Appellant*

UNITED MINE WORKERS OF AMERICA; et al.

Appellees

BITUMINOUS COAL OPERATORS'
ASSOCIATION, INC.

Amicus Curiae

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON. DENNIS R. KNAPP, DISTRICT JUDGE.

No. 76-1846

SOUTHERN OHIO COAL COMPANY,
a Corporation, and OHIO
POWER COMPANY, a Corporation

Appellants

v.

UNITED MINE WORKERS OF AMERICA, et al.

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT ELKINS.
ROBERT E. MAXWELL, DISTRICT JUDGE.

Argued August 10, 1976 Decided July 6, 1977.

Before WIDENER, Circuit Judge, LIVELY, Circuit Judge,* and MacKENZIE, District Judge.**

WIDENER, Circuit Judge:

This appeal is a consolidation of three related cases. In all three, plaintiff coal companies sought damages and injunctive relief in the federal district courts against striking union locals. Relief was denied for various

*United States Circuit Judge for the Sixth Circuit, sitting by designation.

**United States District Judge for the Eastern District of Virginia, sitting by designation.

reasons and by various procedures. In each case the appellant is the coal company.

The facts of each case will first be discussed separately.

I

Case No. 76-1793 involves Cedar Coal Company (Cedar) and the United Mine Workers of America, Local Union No. 1759 (Local 1759). Cedar is a West Virginia Corporation engaged in the production, preparation, and shipment of bituminous coal. Local 1759 is a local union which represents the employees who work at five mines owned by Cedar: Grace No. 3, Ridgeroad No. 5, Coal Fork Nos. 1 and 2, and Slaughter's Creek No. 1. Cedar and Local 1759 are signatories to the National Bituminous Coal Wage Agreement of 1974 which contains specific arbitration procedures, and, in Article XXVII, the following clause:

ARTICLE XXVII—MAINTAIN INTEGRITY OF CONTRACT AND RESORT TO COURTS

> The United Mine Workers of America and the employers agree and affirm that, except as provided herein, they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" Article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract

and by collective bargaining without recourse to the courts.

Prior to June 1976, a dispute arose at Grace No. 3 mine over the meaning of Subparagraph III, (a) (7) of the 1974 Agreement:

> "The Employer shall station a responsible employee on the surface to communicate at all times with the employees when they are at work underground."

The dispute was whether this provision required this job, the "responsible employee," be given to a member of the bargaining unit, and if so, whether the company was required to create a new bargaining unit job to be posted for job bidding under the collective bargaining agreement or whether the duty could be assigned as an additional duty to an employee holding an existing bargaining unit job. The parties submitted the dispute over the meaning of subparagraph (7) to arbitration. On June 3, 1976, the arbitrator decided the contract required Cedar to assign the job to a bargaining unit member, a decision vindicating the Union's position.

But perhaps because the arbitrator misunderstood the full scope of the dispute, he did not decide whether the provision required Cedar to create a new job and to post it for bidding by bargaining unit members. The dispute continued over this undecided issue and on June 22 employees at Grace No. 3 mine went on strike in support of their continuing demand that the company create and post a new job for bidding.

The District and Local Unions filed suit in the United States District Court on June 23, seeking injunctive relief to enforce the arbitrator's decision as they interpreted it, that is, as requiring a new job classification

and posting. The hearing on the TRO-preliminary injunction against Cedar was scheduled for June 23, but because of a continuing jury trial, the district judge rescheduled the hearing for the following morning. The employees of Grace No. 3 returned to work on June 23, but apparently dissatisfied with the postponement of their case in the district court, the Union continued striking the following morning, June 24, when employees at all of Cedar's mines, whose employees were members of Local 1759, struck, and Local 1759 decided not to pursue further its request for injunctive relief in the courts although a hearing had been set. The record in that case discloses that it is still pending.

On June 24, Cedar suspended, subject to discharge, two employees of Grace No. 3 mine who allegedly instigated and encouraged the strike by picketing. The employees filed a grievance over the suspensions and the parties submitted the matter to arbitration. The arbitrator, on July 1, upheld the suspension of the two Grace No. 3 mine employees for two weeks without pay, but rejected their discharge as too severe. A protest over the suspension of these employees and a demand that the suspension be rescinded became additional reasons for the strike, which continued unabated.

Between June 26 and July 10, the strike was interrupted by the miners' regularly scheduled vacation. During this time, the arbitrator rendered a written decision on the posting issue which had been decided and delivered orally July 1. On July 9, he announced in writing that Cedar could assign the communications task to a bargaining unit member as an ancillary duty and did not have to post a new job for bidding by bargaining unit members.

On July 12, the first work day after vacation, Grace No. 3 and Coal Fork mines did not return to work, resuming the strike. The Coal Fork mines returned to work on July 13, but all Cedar employees (including those at the Coal Fork mines) represented by Local 1759 (and by Local 1766) resumed the strike on July 14 and remained continuously on strike to the time this appeal was heard.

On July 12, Cedar filed suit for injunctive relief and damages under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185. Cedar alleged that the unions and employees followed a "pattern and practice of refusing to submit . . . disputes . . . to peaceful settlement through grievance and arbitration procedures," that this pattern would continue, and that the present strike was over the arbitrator's rulings both as to the discharged employees and as to the job posting of the communication job. At the same time, Cedar moved for a preliminary injunction and a temporary restraining order. The TRO issued on July 13, to expire ten days later, and the hearing on the preliminary injunction was set for July 21. The employees protested the company's action in obtaining the restraining order and disputed the company's right to resort to the courts to enforce the arbitrator's decisions and the arbitration and implied no-strike provisions of the collective bargaining agreement. They indicated to Cedar's personnel manager that these actions were additional reasons for striking at all of the company's mines.

Although copies of the TRO were posted and served upon the employees, the strike continued and spread to other mines. At a hearing on civil contempt before the district court on July 16, two individual employee defendants were found guilty of contempt and fined $50

each. The judge imposed on the union a $25,000 per day coercive civil contempt fine and a $50,000 compensatory fine.

On July 20, Local 1759 filed a motion to vacate the TRO, emphasizing the three points to its position:

1. It argued the dispute was not arbitrable under *Buffalo Force Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), because the strike, it said, since at least July 18, was to protest federal labor injunctions and was in response to pickets from other locals who prevented employees from returning to work by "asking 'all UMWA miners to strike to stop the injunctions.'" Therefore, it argued the district court lacked jurisdiction for an injunction under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15.

2. It argued that because of threats of violence and the likelihood of personal injury created by an abnormally dangerous condition at the mine, the employees' refusal to return to work was not a strike under section 502 of the Labor Management Relations Act, 29 U.S.C. § 143, and therefore not enjoinable under 29 U.S.C. § 185.

3. Because the strike was not authorized by the defendant labor unions, it was a "wildcat" strike, and the unions could not be held responsible for it.

On July 22, Cedar suspended another three members of Local 1759 for picketing their own operations. According to an affidavit by Cedar's personnel manager, those discharges have since been an additional cause of the strike. The grievances filed in response to those suspensions are now pending before the arbitrator.

July 22 was also the day scheduled for the hearing

on Cedar's preliminary injunction. But the attorneys for both parties were not available because of court appearances related to other litigation over the strike. The district judge therefore continued the hearing to July 27, and extended the TRO until that day. But on July 23 the judge continued the hearing indefinitely without stating any reasons. On that day, according to an affidavit of the personnel manager of Cedar, Hayes Holstein, the President of Local 1759 called him to say that at a Local meeting, 1759 decided to continue striking until four additional demands were met. These demands were:

1. That the UMWA receive justice equal with that given coal companies in the federal courts.

2. That the judges of the United States District Court for the Southern District of West Virginia be investigated to see whether they have been improperly influenced to side with coal operators against the UMWA.

3. That Cedar Coal Company dismiss and abandon all of its cases in federal courts, including all contempt actions, and further abandon and withdraw all contractual disciplinary action taken against any members of Local 1759, and

4. That all coal operators including Cedar pledge not to take any further legal or contractual actions against members of the UMWA for their actions relating to the strike.

Cedar applied for an injunction pending appeal under Rule 62 FRCP. The district court denied the motion, saying:

> ". . . [A]lthough plaintiff may be entitled to such on the basis of the allegations in the verified complaint and the affidavit attached to the motion, such an injunction would not serve to end the strike; but would be unenforceable, and might aggravate and prolong the strike by further antagonizing the miners engaged in the strike."

Cedar then applied for an injunction pending appeal to the writer of this opinion, acting as a single judge under FRAP 8 "in an exceptional case where reference to a panel would be impracticable due to the requirements of time", who granted an injunction ordering Local 1759 to refrain from striking over any dispute concerning the arbitrator's decisions relating to the outside communication job or the discharge of the two employees.

Cedar now appeals the district court's continuance indefinitely of the hearing for a preliminary injunction, under 28 U.S.C. § 1292(a) (1).

II

Case No. 76-1785 concerns another local union of the United Mine Workers of America within District 17, Local 1766, whose members are employees of Cedar Coal Company and are signatory to the National Bituminous Coal Wage Agreement of 1974. Members of Local 1766 work at Cedar's Denny Surface and Grace No. 2 mines.

On June 24 and 25, members of Local 1766 encountered pickets at the mouth of Slaughter's Creek Hollow, the main entrance to mines under the jurisdiction of Local 1766. Local 1766 employees did not cross the picket lines and did not report to work on those days. According to the Union, the pickets told members of Local 1766 that they were striking in protest of federal court in-

junctions in labor disputes. It is admitted that these initial pickets were from Local 1759.

After the regular annual vacation from June 26 to July 10, members of Local 1766 returned to work for two days. On July 14, pickets again appeared at the beginning of the work shifts. Local 1766 members did not report for work that day and have remained out up to the time of the argument of this case.

On July 20, Cedar filed suit against Local 1766, and the district and international unions, under 29 U.S.C. § 185. The complaint included allegations that the miners had for a long time followed a pattern and practice of refusing to submit arbitrable disputes to peaceful settlement through the arbitration procedures, and of engaging repeatedly in work stoppages instead. It also alleged a pattern and practice of the defendants to treat arbitrable disputes arising at any mine of any signatory operator as their own, as disputes between all employees and all signatory operators, and as directly involving the terms and conditions of employment of all employees at all mines. This strike, the complaint alleged, was over the arbitrator's rulings in the disputes of Local 1759.

Although a district judge of the court, as before recited, had entered a TRO restraining Local 1759 "and all persons acting in concert and participation with it, from continuing to engage in the strike," Local 1766 did not return to work. As a result, all of Cedar's mines served by Locals 1759 and 1766 were shut down and rendered idle.

Filed with Cedar's complaint against Local 1766 was a motion for a TRO. On July 20, the district judge denied the motion, giving three reasons:

1. Since the dispute originally arose between Cedar and Local 1759, it was not 1766's dispute even though they might profit from its resolution. As far as 1766 was concerned, it was, instead, a sympathy strike.

2. "I understand from Buffalo Forge, when they said that the *Armco* case was plainly wrong, or whatever the words were, it was my understanding that that meant that whether or not to cross a picket line was not an arbitrable issue and therefore they couldn't be compelled to cross a picket line," and

3. Whatever its original cause, the strike developed into protest over real or imagined wrongs by the federal courts.

After the court announced that it intended to rule against Cedar on the motion for a TRO, counsel for Local 1766 moved the court to dismiss the complaint for failure to state a claim upon which relief could be granted. The court granted the motion and dismissed the complaint, not just as against Local 1766 but as against all defendants.

Cedar immediately moved for an injunction pending appeal, which was denied, and then applied to the writer again, sitting as a single judge under FRAP 8, who denied the application, saying the outcome of the appeal in view of the recent Supreme Court case of *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), was not certain enough to warrant an injunction pending appeal.

Cedar, in case No. 76-1785, appeals the dismissal of its complaint for failure to state a claim upon which relief could be granted.

III

Case No. 76-1846 involves employees of Southern Ohio Coal Company (Southern), a coal mining corporation in Marion County, West Virginia. Local 1949 is the labor organization representing Southern's production and maintenance employees working at the Martinka Mine. Southern is a signatory to the National Bituminous Coal Wage Agreement of 1974 with the UMWA, of which defendants District 31 and Local 1949 are members.

A work stoppage at the Martinka mine began at 12:01 a.m., Monday, July 26, when employees met, at the access road to the mine, twelve to fifteen pickets who were passing out handbills reading as follows:

> "UMWA STRIKE AGAINST INJUNCTIONS
> "UMWA LOCAL UNION 1759, CEDAR COAL COMPANY HAS A FEDERAL INJUNCTION AGAINST THEM. THEY ARE BEING FINED $50,000 and $25,000 A DAY FOR STRIKING.
>
> "WE ARE SICK AND TIRED OF THE FEDERAL COURTS TAKING THE SIDE OF THE COAL OPERATORS. HUNDREDS OF LOCALS ALL THROUGHOUT THE COAL FIELDS KNOW HOW UNJUST THE USE OF FEDERAL INJUNCTIONS ARE.
>
> "ALL UMWA MINERS ARE ASKED TO STRIKE TO STOP THE INJUNCTIONS AND TO END ALL FINES AND SENTENCES.
>
> "Paid by UMWA members, Combined Miners,
>
> Robert Nelson, Chairman"

Some of these pickets were drinking and some appeared to be drunk. The district court found the pickets were not members of Local 1949, but were UMWA

members. In its oral opinion the court stated that the Southern employees "perhaps from fear or perhaps from exercise of a right not to cross picket lines, or perhaps for other reasons, respectful of the picket line and its meaning to them,. . . did not cross it either at the midnight shift or at the 8:00 a.m. [shift]." It went on to find that the resulting work stoppage was "one of failure to cross a picket line maintained by others than the members of this particular local union."

On July 26, Southern filed suit against District 31 and Local 1949 in the district court under 29 U.S.C. § 185, asking for damages and injunctive relief. The complaint alleged that the work stoppage was the result of refusal to cross a picket line, and took the position that this was a dispute resolvable under the arbitration provisions of Article XXIII of the collective bargaining agreement. The complaint further alleged that defendants refused to submit the matter to arbitration, and that they "engaged in a willful and deliberate pattern of refusing and avoiding compliance with the arbitration and grievance procedures," resorting instead to work stoppages, a conclusion based on fifteen other work stoppages by this local and district under the 1974 contract. There was nothing to indicate, the complaint continued, that such past pattern would not continue. But, after evidence was taken, plaintiffs' counsel conceded that there had been no refusal to arbitrate. Just as importantly, although given the opportunity, the union did not agree to arbitrate without concurrently striking, although arbitration was demanded.

Motions for a preliminary injunction and TRO accompanied the complaint. At a hearing on both,[1] the district

[1]The district judge adopted a commendable procedure. He heard both motions together and heard oral evidence.

court took testimony and then denied the motions, relying on *Buffalo Forge* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976). Southern then appealed from the denial of injunctive relief and applied for an injunction pending appeal. As with Locals 1759 and 1766, Local 1949 had remained on strike until the argument of those cases with this one.

After the case was argued on the issue of an injunction pending appeal, we inquired of the parties if the issue of the denial of a preliminary injunction should be decided now, rather than deferring the matter, and they graciously agreed and filed additional authorities, all recognizing that that issue had to follow regardless of the outcome of a ruling on the injunction pending appeal.

IV

We may not close our eyes to the fact freely argued by the parties that the strike which commenced with the grievance of Local 1759 spread to affect at least a substantial part of the bituminous coal industry. It has since ceased and we have received additional briefs on mootness.

V

In case No. 76-1785 concerning Local No. 1766, et al, the unions take the position that the order dismissing the complaint is not an appealable order under 28 USC § 1291.

> The full text of the order is as follows:
>
> "On motion of the defendants under Rule 12(b)(6) of the Federal Rules of Civil Procedure, it is hereby ordered that plaintiff's complaint be, and it hereby is, dismissed with prejudice for failure to state a claim upon which relief can be granted. "Enter: This 20 day of July, 1976."

The gist of the unions' argument is that, because the order dismisses the complaint, rather than adjudicates, and might leave room open for later amendment, it is not an appealable order within the contemplation of § 1291. We do not agree. Not only does the transcript indicate that the order was intended to be in all respects final, we think an order dismissing a complaint with prejudice for failure to state a claim upon which relief can be granted, with no mention of amendment, and no attempt at amendment shown in the record, is a final appealable order under § 1291.

VI

In case No. 76-1793 concerning Local No. 1759, et al, the unions contend that the indefinite continuance of the motion for a preliminary injunction is not a denial of injunctive relief and thus is not an appealable order under 28 USC § 1292(a)(1).

It must be remembered that the temporary restraining order issued by the court was to expire on July 23rd and that the hearing on the preliminary injunction had been set for July 22nd but was not heard on motion of the unions because the attorneys for both sides were not available due to court appearances related to other litigation concerning the strike. On that account, the court had continued the hearing on the preliminary injunction to July 27th and had extended the TRO until the 27th. But on July 23rd the judge continued the hearing on the preliminary injunction indefinitely, that is to say "until the further order of . . . [the] court," stating no reason, and the matter has never been heard, although it was bound to have been brought to his attention by the application for an injunction pending appeal which was asked for in that court. So the failure to hear the

motion for the preliminary injunction cannot be taken as inadvertence; rather, it may only be construed as a conscious denial of a hearing on the motion for a preliminary injunction and a similarly conscious allowing of the expiration of the TRO.

We hasten to add that by use of the word "conscious," we attribute no improper motive to the district judge, rather using the word to distinguish between acts which are voluntary on the one hand and inadvertent on the other.

We think the indefinite continuance amounted to the refusing of an injunction and is appealable as such under 28 USC § 1292(a). In indistinguishable circumstances, the Fifth Circuit has held such action appealable in *United States* v. *Lynd*, 301 F2d 318 (5th Cir. 1962), and noted the holding with approval in *Kennedy* v. *Lynd*, 306 F2d 222, 229, n. 3 (5th Cir. 1962). See also *McCoy* v. *Louisiana, etc.*, 332 F2d 915 (5th Cir. 1964). We follow those precedents. See also Wright and Miller, *Federal Practice and Procedure*, Vol. 11, § 2962. Were an appeal not allowed under the facts as they are presented to us in this case, it would permit a plain denial of even the bare consideration of whether to consider injunctive relief to go unaccounted for by virtue of an indefinite continuance. We are aware, of course, that the mere expiration of the TRO gives no ground for appeal. See Wright and Miller, supra.

Since we treat the district court's action as the refusal of a preliminary injunction, the question before us is whether the refusal was an abuse of discretion.

VII

The next defense the unions assert to these cases is that they are moot so far as the injunctive aspects of

them are concerned. It is not contended that the damages question in case No. 76-1785 (Local 1766) is moot.

Their principal argument is that the mootness issue is controlled by *Oil Workers Local 8-6* v. *Missouri*, 361 U.S. 363 (1960), which followed *Harris* v. *Battle*, 348 U.S. 803 (1954).

In our case, the strike ended after the argument of the case and the day before a hearing for Local 1759 on a civil contempt citation before this court.

We think the cases are not moot, it being remembered that the questions before us in No. 76-1793 (Local 1759) and No. 76-1846 (Local 1949) are the denials of preliminary injunctions, while the question before us in No. 76-1785 (Local 1766) is the denial of any relief, temporary restraining order, preliminary or permanent injunction, or damages.

We begin with the proposition that mootness is a jurisdictional question going to the existence of a case or controversy under Article III of the Constitution. The rule is stated in *North Carolina* v. *Rice*, 404 U.S. 244 (1971), that courts are not empowered to decide moot questions or abstract propositions, but the exercise of judicial power depends upon the existence of a case or controversy. The suit must be definite and concrete, touching the legal relations of parties having adverse legal interests and be a real and substantial controversy admitting of specific relief through a decree of conclusive character as distinguished from an opinion of what the law would be upon a hypothetical statement of facts.

Neither side would take exception, we think, to the just stated proposition. The unions, however, claim that under *Oil Workers* these cases are required to be moot

because the strike has ended. In that case, the State of Missouri seized, under a Missouri statute, a public utility which had been the subject of a strike by the union. After the seizure, the State procured an injunction against the strike in a State court, and the strike terminated a day later. A month after that, a new collective bargaining agreement was signed, and two months later, the governor ended the seizure. During the course of the litigation, the injunction had expired by its own terms. The court held the case moot, stating that a judgment at that late date would be wholly ineffectual for want of a subject matter on which to operate, and an affirmance would ostensibly require something to be done which had already taken place, while a reversal would ostensibly avoid an event which had already passed beyond recall.

The *Oil Workers'* opinion did not discuss *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498 (1911), stating that the application of that case to a similar fact situation had been rejected in *Harris* v. *Battle*, 348 U.S. 803 (1954). *Oil Workers* differs from our case in that there a new collective bargaining agreement was signed which had removed the cause for the strike. Here, the same collective bargaining agreement is present. In *Oil Workers*, the court said that adjudicating the merits would be an adjudication of a cause which no longer exists. In our case, as we show, the controversy is very much alive.

Oil Workers, however, was followed by *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963), which involved the validity of the same Missouri statute at issue in *Oil Workers*. In *Bus Employees*, the governor had seized a bus company under the same statute utilized in *Oil Workers*. After the filing of the jurisdictional statement in the Supreme Court, the governor, however, terminated the seizure order, leaving the labor dispute unresolved. The Court held the case was not moot and distinguished *Oil Workers* because in *Oil Workers* the underlying dispute had been settled and a new collective bargaining agreement had been executed. The Court added that there existed in *Bus Employees* not merely the speculative possibility of the invocation of the statute in some future labor dispute, but the presence of an existing unresolved dispute which continued subject to all the provisions of the statute involved. The report does not indicate whether or not the strike which had previously been enjoined by a State court in Missouri started up again after the executive order of the governor dissolving the seizure order.

In arriving at our conclusion, we have kept in mind the anti-injunction policy of the Norris LaGuardia Act and that we should avoid the at-largeness which brought it on. See *Sinclair Refining Company* v. *Atkinson*, 370 U.S. 195, 215, 219 (1962) (Mr. Justice Brennan dissenting). We have also been mindful of the often repeated admonition that we should not lend ourselves to becoming potential participants in a wide range of arbitrable disputes under existing and future collective bargaining agreements for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator. See *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976). As stated in *Buffalo Forge*, p. 409, there is no general federal anti-strike policy, and the Supreme Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris LaGuardia Act, which of course is subject to *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970).

The mootness doctrine is nothing new, and years ago, in *Southern Pacific Terminal*, the Court held a controversy not moot which was capable of repetition, yet evading review. In that case, the Interstate Commerce Commission had issued an order to cease granting one Young an undue rate preference for a period of not less than two years. The period as extended had expired prior to the hearing of the case by the Supreme Court. The Court recited the mootness rule as that when "pending an appeal something occurs without any fault of the defendant which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed." p. 514. It stated that in such cases the acts sought to be enjoined had been completely executed and there was nothing that the judgment of the court could have effected. A part of the reasoning was that the ICC usually operated by continuing orders and that it ought not to be able to defeat, by short term orders issued from time to time, the judicial construction of its orders which affected both the government and a carrier. The Court also mentioned the rights of the public which the government had endeavored to procure by the judgment of a court. Following *Southern Pacific Terminal*, numerous cases have considered the "capable of repetition, yet evading review," rule. The ones which immediately concern us are *Sosna* v. *Iowa*, 419 U.S. 393 (1975), and *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). *Sosna* did not involve a labor union, rather holding not moot a claim contesting the validity of an Iowa divorce residency statute where a class of plaintiffs had been certified although the named plaintiff had completed her residency and, indeed, been divorced elsewhere. The significance of *Sosna* to this opinion is that it is construed in *Weinstein* v. *Bradford*

(a prisoner's rights case) in the context of application of the capable of repetition, yet evading review doctrine. The doctrine is there construed as limited to a situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The second part of that standard is not substantially different from the one applied by us only shortly before in *Linkenhoker* v. *Weinberger*, 529 F2d 51, 52-53 (4th Cir. 1975).

The complaint in case No. 76-1785 (Local 1766) charges that the unions have for a long time past followed a pattern and practice of refusing to submit arbitrable disputes or differences to peaceful settlement through the grievance and arbitration procedures provided by said contracts and have repeatedly engaged in strike and work stoppages with an object to forcing and requiring Cedar and other signatory operators to settle such disputes and differences in accordance with the demands of the unions and in violation of said contracts. It also charges that since the effective date of the collective bargaining agreement the unions had repeatedly threatened and engaged in strikes and work stoppages with an object to forcing and requiring Cedar and other signatory operators to settle differences and disputes which are required to be settled under the terms of the collective bargaining agreement by the grievance and arbitration procedure in accordance with the demands of the unions. The complaint also charges that there is, and has been for many years, a pattern and practice of the unions to treat and consider arbitrable disputes and differences arising at any and all mines of signatory operators covered by the collective bargaining agree-

ment as their own, and to adopt as their own and as matters directly involving their own self-interest any and all disputes and differences arising at any mine of any operator signatory to said collective bargaining agreement, to engage in strikes and work stoppages in connection therewith in derogation of the collective bargaining agreement grievance procedures in order to coerce the operators into interpreting, applying, and administering the terms and provisions of the collective bargaining agreement favorably to the unions. The complaint further charged that the unions engaged in a strike over and in protest of the arbitrator's rulings with respect to the job posting dispute and consequent discharges which we remember took place in the mines served by Local 1759, the sister union of Local 1766.

The complaint alleges irreparable injury and damages and prays for injunctive relief to halt the strike, to require the present dispute to be submitted to arbitration, to require future arbitrable disputes to be submitted to arbitration, and for damages.

The complaint in case No. 76-1793 (Local 1759) alleges that the unions had for a long time past followed a practice of refusing to submit local or district disputes or differences at plaintiff's mines or related facilities to peaceful settlement through the grievance and arbitration procedures provided by the collective bargaining agreement but had repeatedly engaged in strikes and work stoppages with an object to forcing and requiring plaintiff to settle such disputes and differences in accordance with the demands of the unions. It is alleged they continue such pattern and practice. The complaint then alleges the disputes over the outside communications job and the discharge of the two employees, with the

resulting arbitrator's awards and the resulting strike over the awards.

The complaint alleges that Cedar has been and now is ready, willing, and able to submit to arbitration any and all matters giving rise to the dispute and work stoppage. It alleges irreparable injury and prays for injunctive relief to halt the strike, to submit the present disputes to arbitration, to submit future arbitrable disputes to arbitration, and for damages.

In case No. 76-1846 (the Southern Ohio and Local 1949 case), the verified complaint was in two counts. The first count alleged a work stoppage as a result of the refusal to cross the picket line previously described, the members of which picket line being later found by the district court to be members of the UMWA but not of Local 1949. It alleged that Southern Ohio was ready, willing, and able to arbitrate the dispute of whether or not the Local 1949 members had to cross the picket line, irreparable injury, and damages.

The second count repeated the allegations of the first count and added that there was a likelihood that the unions might repeatedly and willfully engage in work stoppages in specific disregard of the collective bargaining agreement's provisions in that under the existing 1974 agreement there had been a total of 15 work stoppages or strikes previous to the existing strike, which had resulted in the loss of in excess of 5,000 man days of work. The complaint alleged a willful and deliberate pattern of refusing and avoiding compliance with the arbitration procedures of the collective bargaining agreement, and resorting instead to the economic pressure of strike and work stoppages for the purpose of coercing accession to demands of the unions which were

subject to the arbitration procedures of the collective bargaining agreement. It alleged that Southern Ohio was and had been ready, willing, and able to arbitrate the disputes but that the unions had refused so to do. The complaint charged that the continuing resort to strikes rather than to arbitration would likely continue into the future.

The complaint, as to the first count, prayed for injunctive relief to stop the strike, to submit the dispute to arbitration, and to take such further action as might be necessary to comply with the collective bargaining agreement. As to the second count, the complaint prayed for injunctive relief to stop the strike, to submit present and future arbitrable disputes to arbitration, and to take action necessary to assure compliance with the terms of the collective bargaining agreement. Damages were asked for under the first count.

In ascertaining whether these cases are moot, because the complaint was dismissed in No. 76-1785 (local 1766), the allegations of the complaint must be taken as true. *Kossick* v. *United Fruit Growers*, 365 U.S. 731, 732 (1961). We think the same principle must apply in case No. 76-1793 (Local 1759), where the district court, by its indefinite continuance, denied injunctive relief without a hearing which deprived Cedar of any chance to present facts other than those alleged in the complaint as surely as if the case had been dismissed. A similar principle, albeit somewhat different, should apply in case No. 76-1846 (Local 1949). In the case concerning Local 1949, a hearing was held, so we should consider both the allegations of the verified complaint and the facts shown at the hearing should they be different from the complaint in any essential element, which they are not.

It is, of course, admitted by all that the strike ended during the pendency of this appeal and only a short while after the argument of the cases. It is therefore apparent that the first element of the test in *Weinstein* was met, that is to say, the challenged actions in each case were in their duration too short to be fully litigated prior to their cessation or expiration. The challenged action of each of the unions is its strike which ended prior to the time it was fully litigated.

In case No. 76-1785 (Local 1766), Cedar has alleged that the unions have followed a pattern and practice of refusing to submit arbitrable disputes or differences to peaceful settlement through the grievance and arbitration procedures provided by the collective bargaining agreement, and that they have repeatedly engaged in strikes and work stoppages with an object to forcing and requiring Cedar to settle such disputes in accordance with the demands of the unions rather than through arbitration as required by the collective bargaining agreement. Cedar also charges a pattern and practice of treating and considering arbitrable disputes and differences arising at other mines of signatory operators covered by the collective bargaining agreement as their own and adopting the same as matters involving their own self interest, and to that end engaging in strikes and work stoppages in connection with such disputes in violation of the collective bargaining agreement grievance procedures.

In case No. 76-1793 (Local 1759), Cedar has alleged that the unions had for a long time past followed a practice of refusing to submit local disputes and differences to settlement through the grievance and arbitration procedures provided by the collective bargaining agreement and that they had repeatedly engaged in strikes

and work stoppages with an object to forcing and requiring Cedar to settle such disputes and differences in accordance with the demands of the unions rather than through the grievance procedures provided by the collective bargaining agreement. Cedar alleges they continue such pattern and practice and that the strike under consideration is an example.

In case No. 76-1846 (Local 1949), Southern Ohio alleges a willful and deliberate pattern of refusing and avoiding compliance with the arbitration and grievance procedures and instead a resort to the economic pressure of strikes and work stoppages for the purpose of coercing accession by Southern to demands of the unions instead of subjecting the disputes to the arbitration procedures of the collective bargaining agreement. It alleges that the unions not only have failed and refused to subject the present dispute, which it says is arbitrable, to the grievance procedure of the collective bargaining agreement, but that the unions have, under the present agreement, engaged in 15 strikes over arbitrable issues instead of arbitrating them, and it alleges this pattern is likely to continue.

Cedar invites us to consider its affidavits filed with its applications for injunctions pending appeal in the ascertainment of whether or not these cases are moot. We think they may be considered in ascertaining whether the cases are moot, although they should not be considered in ascertaining the merits. This is so because there was no mootness question before the district court, so we are not reviewing that. Rather, we are deciding whether the cases are now moot, and just as the end of the strike during the pendency of the appeal is a fact which we should consider in deciding the mootness question, we should also consider other undisputed

relevant facts. As we have stated, mootness as we consider it here arises when "something occurs" "pending an appeal." *Southern Pacific Terminal*, p. 514. One affidavit filed by Cedar with respect to Locals 1759 and 1766 shows that there have been 15 strikes by Cedar employees and local unions under the 1974 agreement over arbitrable issues; that 7 of those strikes were engaged in by employees at mines other than the mine at which the dispute causing the strike arose, as well as by the employees at the mine where the dispute arose. The other affidavit shows there have been 26 strikes by Cedar employees and local unions under the 1974 agreement, 12 of which were engaged in by employees at more than one of the company's mines, and all of the 12 strikes were engaged in by employees in both Locals 1759 and 1766. While these affidavits may seem, on their face, to possibly be somewhat inconsistent, they are not necessarily so, which further points out the difficulty caused by the district courts' failures to grant hearings in either of these proceedings. These facts in all events are essentially undisputed by the unions as they may relate to our examination of the mootness question.

We think the allegations of a pattern and practice of strikes over arbitrable issues instead of resorting to the grievance procedures of the contract, coupled with the allegations in these three cases, of repeated specific instances of striking over such issues rather than arbitrating, are facts sufficient to show that there was a reasonable expectation that the same complaining parties (Cedar and Southern Ohio) would be subjected to the same action again, and thus that the second condition of the doctrine as set out in *Weinstein* has been complied with.

In this context, we note that in at least two cases the

Supreme Court has noted, in cases involving labor relations and strikes, that a factor to be considered is that ". . . authorizing the issuance of a temporary injunction as is frequently true of a temporary injunction in labor disputes, may effectively dispose of . . . [litigants] rights and render entirely illusory his right to review . . . [in the Supreme Court] as well as his right to a hearing before the Labor Board." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 308 (1964). That principle was alluded to in *Liner* in holding a case not moot in an appeal by a union. The same principle was relied on in *Super Tire Engineering Company* v. *McCorkle*, 416 U.S. 115 (1974), and especially as that case was construed in *Weinstein*, p. 148. The principle quoted from *Super Tire* in *Weinstein*, at p. 148, is that " 'the great majority of economic strikes do not last long enough for a complete judicial review of the controversies they encounter,' " see *Super Tire*, 125-126.

The unions next argue that even if the issue is one properly framed as capable of repetition, yet evading review, that the cases only allow this view of mootness when a governmental interest is involved. See *Super Tire*, p. 122. We think this position is a too narrow view of the mootness doctrine. As a matter of principle, we doubt that a court is any less obliged to do justice between man and man than between citizen and sovereign. It is true that in the cases involving governmental entities, there will ordinarily be a policy, statute, or regulation which, unless not revoked or repealed, will continue to exist and which may indeed make more likely a repetition of the event which brought on the controversy in question. *Super Tire* phrases it as a brooding presence. But the Supreme Court, in *Carpenters Union* v. *Labor Board*, 357 U.S. 93 (1958), in note 2, has applied the

rule of *United States* v. *W. T. Grant*, 345 U.S. 629 (1953), to a dispute between companies and unions before the Labor Board over the hot cargo provisions of union contracts. The "sole question" in that case was whether the hot cargo provisions of the collective bargaining agreements involved amounted to an unfair labor practice in violation of 29 USC § 158(b) (4) (A). The *W. T. Grant* holding applied in the *Carpenters Union* case was that the case was not moot since the court could not say there was no danger of recurrent violation. No analysis of mootness in a case involving a labor dispute would be complete without the consideration of *Buffalo Forge* at note 8. In that case, the sympathy strike of a production and maintenance union took the form of those employees refusing to cross a picket line established by office and technical workers. Although the dispute between the office and technical workers and the company continued, the production and maintenance employees' sympathy strike had ended prior to the hearing of the case, but the strike might have been "resumed at any time in the near future at the direction of the international union or otherwise." 45 L.W. at 5348. The court held the case was not moot despite the return of the production and maintenance employees to the job, relying on *Super Tire* and *Bus Employees*. It stated that "[t]he presence of an existing dispute makes this a live controversy. . . ." 45 L.W. at 5348, note 8.

The importance of the holdings in *Buffalo Forge* and *Carpenters Union* are that in each of them the court applied, to disputes between companies and unions, the same mootness rules applicable in the cases in which there appeared a public interest such as the enforcement of a statute. And in both of those cases, which were suits between private parties over the construction of

collective bargaining agreements and involving strikes which had ended during the pendency of the actions, the Court relied upon cases which had been decided in the context of the presence of a public order, statute, regulation, etc. This leads us to believe that the rules for ascertaining mootness in public interest and private cases should be essentially the same. While it is true that courts may take a longer look at cases involving a public policy, statute, or regulation because of the continuing presence of such, we do not think it is true that different rules are applied. Indeed, since mootness is a jurisdictional principle, no sense of urgency brought about by the application of a public law, etc., should be able to confer jurisdiction on a court where it has ceased.

In this respect, we also note that the collective bargaining agreement here in question affects a substantial part of the entire bituminous coal industry in the United States. All signatory operators throughout the country are considered a single bargaining unit. See *United Mine Workers*, 179 NLRB 479 (1969). The Bureau of Mines weekly coal report of March 18, 1977, for example, shows that West Virginia produces more than 15% of the nation's bituminous coal, 2,086,000 tons in that week. The plan on file in this court for the disposition of criminal cases from the Southern District of West Virginia shows that in fiscal 1975 there were about 300 *Boys Market* injunction cases in the Southern District of West Virginia alone involving wildcat strikes. So, if the public interest is a *sine qua non* in determining whether or not the capable of repetition, yet evading review doctrine is to be applied, and we doubt that it is, we think the public has an interest in having decided the questions which have arisen again and again between

the parties here and which in the strike involved in these cases directly affected almost the entire bituminous coal industry of the nation.

Accordingly, we hold that the questions are not moot. Accord, *Atlantic Richfield Co.* v. *Oil and Chemical Workers Int. Union*, 447 F2d 945 (7th Cir. 1971).

VIII

A.

In each of the cases before us, there is no argument but that, aside from the question of the construction of *Buffalo Forge*, the necessary prerequisites for the issuance of *Boys Markets'* injunctions have been met as set out in that opinion at page 254, and no discussion of those various factors is either necessary or appropriate here.

B.

Our principal problem is to construe *Buffalo Forge* and apply it to the facts of these cases.

Certiorari was granted in *Buffalo Forge* because the Courts of Appeals were divided in their construction of *Boys Markets*, and the Court set *Buffalo Forge* in the context of a statement by the Court of Appeals that the strike in that case was not " 'over a grievance which the union has agreed to arbitrate' ". 428 U.S. at 404 (1976); 417 F2d at 1210 (2d Cir. 1975). In *Buffalo Forge*, two office and technical workers' locals of the United Steelworkers had been certified to represent the office and technical employees but were unable to consummate their first collective bargaining agreements with the company. They struck and established picket lines, as they had a right to do, in the prosecution of their demands. The office and technical workers' strike and

pickets were, of course, a part of a classically legitimate strike. Two other locals of the United Steelworkers, representing the production and maintenance employees of the company, refused to cross the office and technical workers' picket lines. The production and maintenance workers had no separate quarrel with the company, but maintained they had a right to refuse to cross the picket lines despite a no-strike clause in their contracts with the company. The only dispute the company had with the production and maintenance locals was whether or not they had a right to refuse to cross the office and technical locals' picket lines. The contracts of the production and maintenance locals also contained broad arbitration clauses. While the Court held, p. 410, that the issue of whether or not the production and maintenance locals' refusal to cross the office and technical picket lines was arbitrable under the contract: "[c]oncededly, that issue was arbitrable," the Court went on to hold that an injunction should not issue pending arbitration and stated that ". . . it does not follow that the district court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator. . . ."

The Court reasoned that "[n]either its [the strike of the production and maintenance locals] causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and . . . [the production and maintenance locals], p. 407, 408.

We think the Court meant to tie together the non-arbitrability of the underlying cause with the cause of the strike at issue so that, when the underlying cause is not subject to arbitration, a refusal to cross a picket line, generated by a strike over the underlying cause,

is not a violation of a no-strike clause which is enforceable by injunction against the strike[1a] although it may be by arbitration. In our opinion, the Court meant thus to restrict the holding of *Boys Markets,* which many cases had taken to be that if an issue were arbitrable, assuming other conditions were met, an injunction might issue to prevent a strike pending arbitration of the arbitrable issue. Following *Buffalo Forge,* it seems that where the underlying issue is not arbitrable, then a refusal to cross a picket line set up on account of that underlying issue, although the refusal may be arbitrable, may not be prevented by injunction pending arbitration.

Our analysis is supported by note 9 in *Buffalo Forge* as it deals with the cases of the various circuits which are overruled at least by strong implication. In *NAPA Pittsburgh,*[2] Altoona Local 110, in a dispute over recognition, picketed the Pittsburgh location where Local 926 was the bargaining agent. The underlying dispute between Local 110 and NAPA Pittsburgh, representation, of course was not arbitrable, especially as between Local 926 and the company. In *Island Creek,*[3] a dispute arose between Local 680 and Florence Mining Company. Local 680 picketed Island Creek, which had as its local 988, both of the UMW. The nature of the dispute between Local 680 and Florence is not divulged in the opinion, but it is obvious that Island Creek could not have arbitrated an issue between Florence and Local 680. In *Armco,*[4] the pickets were to protest federal and State allocation of gasoline, a matter obviously not sub-

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[1a] Pending arbitration of course.

[2] *NAPA Pittsburg, Inc. v. Automotive Chauffeurs,* 502 F2d 321 (3rd Cir. 1974), cert. den. 419 U.S. 1049 (1974).

[3] *Island Creek Coal Co. v. Mine Workers,* 507 F2d 650 (3rd Cir. 1975), cert. den. 423 U.S. 877 (1975).

[4] *Armco Steel Corp. v. Mine Workers,* 505 F2d 1129 (4th Cir. 1974), cert. den. 423 U.S. 877 (1975).

ject to arbitration in any context. In *Pilot Freight Carriers,*[5] Local 512, from Jacksonville, Florida, was in dispute with Pilot over recognition. On account of that dispute, the employer was picketed at its Kernersville, North Carolina installation, which had as its local 391, both Teamsters Locals. The underlying recognition dispute, of course, was not arbitrable in any context. In *Wilmington Shipping Company,*[6] employees of the Port Authority struck and picketed the Port of Wilmington. Local 1426 of Wilmington Shipping Company refused to cross the picket line, as it had a right to do if the picket line were bonafide. The dispute was over whether or not the picket line was bonafide, and the parties agreed that this was an arbitrable matter under the contract. It is seen, though, that Wilmington Shipping Company could not have agreed to arbitrate with Local 1426 the underlying dispute between the Port Authority and its employees. In *Monongahela,*[7] Local 2357 was in a dispute with the employer at Clarksburg over recognition and as a result picketed the employer at Panhandle, which had as its local 2332, both IBEW. It is seen that Local 2332 and the employer could not have arbitrated a dispute over recognition between Local 2357 and the same employer. In *Valmac,*[8] Local 425 had separate contracts with the employer at four towns in Arkansas. As a result of contract expirations at two of the towns and the resulting dispute, the employer's operations at the other two towns were picketed. The renewals of the contracts, of course, were not subject to arbitration.

[5]*Pilot Freight Carriers, Inc. v. Teamsters,* 497 F2d 311 (4th Cir. 1974), cert. den. 419 U.S. 869 (1974).

[6]*Wilmington Shipping Co. v. Longshoremen,* 86 LRRM 2846 (4th Cir. 1974), cert. den. 419 U.S. 1022 (1974).

[7]*Monongahela Power Co. v. Electrical Workers,* 484 U.S. 1209 (4th Cir. 1973).

[8]*Valmac Industries v. Food Handlers,* 519 F2d 263 (8th Cir. 1975), vacated 428 U.S. 906 (1976).

In *Associated General Contractors,*[9] Local 110, IBEW, picketed a job site on which the electrical subcontractor was paying lower wages than Local 110 contracts would have provided for had it been on the job instead of Local 84 of the Christian Laborers Association, which had the electrical subcontracting labor. In a suit brought by the general contractor and the mechanical subcontractor against their locals which refused to cross 110's picket lines, it is seen that the underlying dispute, that of the lower wages paid to members of Local 84, was not subject to arbitration between the general and mechanical contractors and their locals.

The theme of all of these cases just named, and overruled at least by implication by the Supreme Court in note 9, is that either the underlying dispute was not subject to arbitration at all or at least it was not subject to arbitration by the defendant union and the company. Put another way, the central question to these cases seems to be: Is the object of the strike at hand to compel the company to concede an arbitrable issue?

Our conclusion as to the central question in cases such as the ones we have before us is further strengthened by the decisions listed in note 9 of *Buffalo Forge* as having been correctly decided.

In *Amstar,*[10] the company's installation at Arabi, Louisiana (Meat Cutters Local No. P-1101) was picketed by ILA pickets presumably in furtherance of an economic dispute with Amstar, whose contracts with longshoremen's locals had expired at Brooklyn, Philadelphia, and Boston. The underlying dispute, an economic one over contract expiration, was not arbitrable, of course.

[9]*Associated General Contractors v. Operating Engineers,* 519 F2d 269 (8th Cir. 1975).

[10]*Amstar Corp. v. Meat Cutters,* 468 F2d 1372 (5th Cir. 1972).

In *Plain Dealer*,[11] the Newspaper Guild was engaged in a lawful economic strike and picketed the paper. The craft unions representing some of the other employees would not cross the picket lines. While neither the district court's opinion nor the per curiam affirmance of the denial of injunctive relief discloses the cause of the underlying strike of the Newspaper Guild, it seems to us doubtful that a lawful economic strike would be arbitrable at all. Thus, Amstar could not concede an arbitrable issue because there was none, and neither could the *Plain Dealer*.

Since the Supreme Court, at p. 407 of *Buffalo Forge*, has stated, in effect, that *Boys Markets* is not overruled, "*Boys Markets* plainly does not control this case," we take it that a correct construction of *Buffalo Forge* is to limit the application of *Boys Markets* so that it does not apply in cases where the only dispute between the company and the union is over the meaning or application of the no-strike provision, express or implied, which dispute has been brought about by a dispute which is not arbitrable. The production and maintenance locals' refusal to cross the picket lines in *Buffalo Forge* was plainly brought about by the dispute between the company and the office and technical locals, which underlying dispute[12] was not arbitrable. So, although the production and maintenance strike obviously was in an effort to compel the company to concede an issue to the office and technical locals, it was not to compel the company to concede an *arbitrable* issue.

We next apply these principles to the controversies between the unions and their respective companies here.

[11] *Plain Dealer Pub. Co. v. Cleveland Typographical Union*, 520 F2d 1220 (6th Cir. 1975).

[12] See *Kentucky West Va. Gas Co. v. Oil, Chemical and Atomic Workers*, No. 76-1852 (6th Cir. 1977).

C.

Case No. 76-1793 involving Local 1759 and Cedar Coal Company.

The best light that can be put on the strike by Local 1759 is that it commenced over the arbitrator's award in the dispute concerning the communications job and was accentuated by the discharge of the two employees for taking part in that strike. Not only were both of these disputes plainly subject to arbitration, they were in fact arbitrated. Indeed, the union filed a suit in the district court to enforce one of the awards.

Extended discussion of this as part of this case is not necessary because of a passage in *Buffalo Forge*, which is:

> "Contrary to the Court of Appeals, the employer claims that despite the Norris LaGuardia Act's ban on federal-state injunctions in labor disputes, the district court was empowered to enjoin the strike by § 301 of the Labor-Management Relations Act as construed by *Boys Markets* v. *Retail Clerks Union*, supra. This would undoubtedly have been the case had the strike been precipitated by a dispute between union and management that was subject to binding arbitration under the provisions of the contracts." p. 406.

The facts of Local 1759's strike fit squarely into this language, and it is clear that, on the facts alleged in the complaint, the refusal to hear the preliminary injunction was error.

We do not think valid the unions' defense that the nature of the strike changed. Their contention is that, following the district court's restraining order, additional causes to those just above set forth were that the company had filed a suit in the federal court to enforce the contract under *Boys Markets* and that the district court

had issued its TRO pursuant to the company's suit. Were we to hold valid a defense in such cases, that the union may strike over the actions a court has taken in its consideration of the matter, such would amount to nothing more nor less than an overruling of *Boys Markets* by the unilateral act of one of the parties and would abandon completely the function of the courts in these cases as set forth in *Boys Markets*. It would be just as tenable for a company which had been ordered to arbitrate by a court to refuse to do so as for a union to do the same thing.

D.

Case No. 76-1785, Local 1766 and Cedar Coal Company.

Local 1766 is the sister local of Local 1759, and it should be remembered that the dispute between Local 1759 and Cedar commenced this whole controversy. The facts in the complaint, which we must treat as true, allege that the strike of Local 1766 was over the arbitrator's rulings between 1759 and Cedar.

While the dispute may not technically have been "over a grievance which both parties are contractually bound to arbitrate," *Boys Markets*, p. 254, see *Buffalo Forge*, p. 404, because it is at least arguable that Cedar could not have conceded the arbitrable issue to Local 1766, it rather being engaged in arbitration with Local 1759, we think that construction of *Boys Markets* is too narrow here. Here, the employer is the same as to both Locals; the collective bargaining agreement is the same; the bargaining unit is the same; the locality of employment is the same; and, most importantly, the purpose of 1766's refusal to cross the 1759 picket lines was not to coerce Cedar into conceding an issue to Local 1759 which was not arbitrable; rather, the purpose of the 1766 strike

was to coerce Cedar into conceding an issue to Local 1759 which was admittedly arbitrable. We also bear in mind that under the two-tier arbitration provisions of the collective bargaining agreement, Article XXIII, the award in the 1759 case apparently would affect also Local 1766, for there are only three grounds of appeal to the Arbitration Review Board: that the decision of a panel is in conflict on the same issue with other panels; that the decision involves a new question of a substantial contractual issue; and that the panel decision is arbitrary, etc.

We think, then, that since the purpose of the strike of Local 1766 was to compel Cedar to concede an arbitrable issue to Local 1759, with the same employer, the same collective bargaining agreement, the same bargaining unit, and the cause of Local 1759 made its own, that the *Buffalo Forge* exception to *Boys Markets* should not apply, and assuming the arbitrability of the question of whether or not Local 1766 might be required to cross Local 1759's picket lines, it was error to dismiss the complaint.

E.

Case No. 76-1846, Local 1949 and Southern Ohio Coal Company.

The district court, in this case, found that the resulting work stoppage was "one of failure to cross a picket line maintained by other than the members of this particular local union."

The court did not find whether the purpose of the strike was merely to express sympathy for Local 1759's position or to require the concession of an arbitrable issue by either Cedar or Southern. But we do not think that a lack of more specific findings should justify recon-

sideration of that point. In this case, there was no dispute between Southern and Local 1949 which had anything to do with the picket line, or not crossing it, until after the picket line appeared. And, while the refusal to cross the picket line may have been an arbitrable dispute, it was the only dispute between Southern and Local 1949. Even considering that the underlying purpose of 1949's strike may have been to put indirect pressure on Cedar to concede an arbitrable issue to Local 1759, Southern could concede nothing to Local 1759 because it was not bound to it by a collective bargaining agreement, and there was no dispute between Southern and Local 1759.[13]

Accordingly, we think the district court correctly denied a preliminary injunction pending arbitration in that case.

IX

This leaves the procedure on remand.

Our opinion is a rather narrow one, going only to the denial of injunctive relief pending arbitration in all three cases and in only one, No. 76-1785 (Local 1766) going to the outright dismissal of the complaint.

We think the issue of whether Local 1766 might be required to cross Local 1759's picket line was an arbitrable issue, and we think the same should be said of the refusal of Local 1949 to cross the picket line made up of UMW members, not necessarily from Local 1759. On remand, the district courts involved should direct those issues to be arbitrated forthwith, and when such arbitration has been completed, then consider those cases (No. 76-1785, Local 1766) (No. 76-1846, Local 1949) in the light of this opinion.

[13]The facts of this case are remarkably similar to *Island Creek*, supra, which the Supreme Court has indicated was decided wrongly in *Buffalo Forge*, note 9.

In these same cases involving Locals 1766 (No. 76-1785) and 1949 (No. 76-1846), the arbitration of the matter of whether those locals might be required to cross the picket lines established should be decided by the arbitrators prior to proceeding with the damages aspects of the cases. *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254 (1962); *Valmac Industries, Inc.* v. *Food Handlers*, 519 F2d 263, 269 (8th Cir. 1975), vacated on other grounds, 428 U.S. 906 (1976).

X

The employees involved in all of these cases are long since back at work and for that reason alone, no presently existing need being shown, in our discretion we deny the request for an injunction pending appeal in case No. 76-1785 (Local 1766).

For the same reasons, in our discretion we dissolve the injunction previously issued in case No. 76-1793 (Local 1759), it being obvious that the district courts may grant temporary injunctive relief if otherwise authorized after remand in any of the cases.

An injunction pending appeal is denied in case No. 76-1846 (Local 1949) for the reasons expressed in this opinion affirming the denial of injunctive relief by the district court.

XI

It should not be implied that, because injunctions may have been authorized against Locals 1759 and 1766, such are presently required. As to that point, we express no opinion, as we also do not as to the various claims made for permanent injunctive relief and damages.

XII

In case No. 76-1785 (Local 1766), the judgment of the district court is vacated and the case is remanded for action not inconsistent with this opinion.

In case No. 76-1793 (Local 1759), the case is remanded for action not inconsistent with this opinion.

In case No. 76-1846 (Local 1949), the judgment of the district court is affirmed and the case is remanded for action not inconsistent with this opinion.

Paragraph X of this opinion and a separate order this date entered will dispose of case No. 76-8239 (Misc.) concerning the injunction pending appeal in case No. 76-1793 (Local 1759).

APPENDIX B

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States have jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

APPENDIX C

Grievance and arbitration provisions of the National Bituminous Coal Wage Agreement of 1974.

ARTICLE XXIII—SETTLEMENT OF DISPUTES

Section (a) Mine Committee

A committee consisting of at least three (3) Employees shall be elected at each mine by the Employees at such mine. Each member of the mine committee shall be an Employee of the mine at which he is a committee member, and shall be eligible to serve as a committee member only so long as he continues to be an Employee of said mine. The duties of the mine committee shall be confined to the adjustment of disputes arising out of this Agreement that the mine management and the Employee or Employees fail to adjust. The Mine Committee shall have no other authority or exercise any other control nor in any way interfere with the operation of the mine; for violation of this section any and all members of the committee may be removed from the committee.

A Mine Committee member shall not be suspended or discharged for his official actions as a mine committee member. An Employer seeking to remove a mine committee member shall so notify the affected mine committee member and the other members of the mine committee. If the Mine Committee objects to such removal, the matter shall be submitted directly to arbitration within 15 calendar days from such objection. If the other members of the mine committee so determine, the affected member shall remain on the mine committee until the case is submitted to and decided by an arbitrator. If the Employer requests removal of the entire Mine Committee, the matter automatically shall be submitted to arbitration within 15 calendar days after such request, and the Mine Committee will continue to serve until the case is submitted to and decided by an arbitrator.

Section (b) Arbitration Review Board

1. Within 60 days following the effective date of this Agreement, the United Mine Workers of America and the Bituminous Coal Operators' Association will establish an Arbitration Review Board composed of one representative of the UMWA, one representative of the Employer, and a chief umpire to be jointly selected by both parties. This 60-day period may be extended by mutual agreement.

2. The chief umpire jointly selected by the parties shall serve for the balance of this Agreement, unless removed by formal resolution adopted by either the International Executive Board of the United Mine Workers of America or the Board of Directors of the Bituminous Coal Operators' Association.

3. In the event of removal, resignation, death or incapacity of the chief umpire, the president of the UMWA and the president of the B.C.O.A. shall endeavor to select a mutually acceptable successor within 15 days. In the event the parties fail to agree, they shall request the aid of the Federal Mediation and Conciliation Service in selecting a mutually acceptable successor. The composition of the panel may be considered by the parties at the time when renewal agreements are being negotiated.

4. The presidents of the UMWA International Union and the B.C.O.A. shall jointly establish a panel of impartial arbitrators for each UMWA district. These panels may be changed, augmented or supplemented by mutual

consent of the appointing parties. Arbitrators may be removed from a panel by either party upon 10 days advance written notice.

Section (c) Grievance Procedure

Should differences arise between the Mine Workers and the Employer as to meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

Disputes arising under this Agreement shall be resolved as follows:

1. The Employee will make his complaint to his immediate foreman who shall have the authority to settle the matter. The foreman will notify the Employee of his decision within 24 hours following the day when the complaint is made.

2. If no agreement is reached between the Employee and his foreman, the complaint shall be taken up within seven (7) working days of the foreman's decision by the mine committee and mine management. Where the committee consists of more than three members, the Employer shall have the right to meet with a maximum of three (3) (to be chosen by the mine committee). The committee and management will complete the standard grievance form stating the Employee's grievance and the response of management.

3. If no agreement is reached by the committee and management within seven (7) working days after the complaint is taken up by them, the grievance shall be referred to a representative of the UMWA district, desig-

nated by the Union, and a representative of the Employer within seven (7) working days of the time the grievance is referred to them. The representative of the Union and the Employer shall review the facts and pertinent contract provisions in an effort to reach agreement. Unless both parties consent, no verbatim transcript of testimony shall be taken. Following the meeting, should they fail to settle the grievance, the representatives shall prepare a concise, joint statement. In the joint statement the Union and Employer will each set forth its views of the facts and its position on the contractual issues. The joint statement shall be signed by the representative of the UMWA district and the representative of the Employer. Neither the Union's representative nor the Employer's shall be persons who participated in steps one or two of this procedure.

4. In cases where the district representative and the representative of the Employer fail to reach agreement, the matter shall, within ten (10) calendar days after referral to them, be referred to the appropriate panel arbitrator who shall decide the case without delay. Cases shall be assigned to panel arbitrators in rotation. Unless testimony has been taken at step 3, at the earliest possible time, but no later than fifteen (15) days after referral to him, the arbitrator shall conduct a hearing in order to hear testimony, receive evidence and consider arguments. In cases where a transcript has been made at step 3, the arbitrator shall have the discretion to conduct a supplementary hearing at or near the mine site. In cases in which the parties have made no transcript at step 3, and the joint statement indicates that there is no question of fact involved in the grievance, the arbitrator may decide the case without a transcript and upon the basis of the joint statement of the parties, exhibits and briefs.

The arbitrator's decision shall be final except as provided in paragraph 5 herein, and shall govern only the dispute before him. Expenses and fees incident to the service of an arbitrator shall be paid equally by the Employer or Employers affected and by the UMWA district affected.

5. Either party to an arbitration, upon receiving a final award by a panel arbitrator, may petition the Arbitration Review Board to appeal the decision of the panel arbitrator. Such petition shall include a statement of the grounds for the appeal, which shall consist of one or more of the following:

(i) That the decision of the panel arbitrator is in conflict with one or more decisions on the same issue of contract interpretation by other panel arbitrators.

(ii) That the decision involves a question of contract interpretation which has not previously been decided by the Board, and which in the opinion of the Board involves the interpretation of a substantial contractual issue.

(iii) That the decision is arbitrary and capricious, or fraudulent, and therefore, must be set aside.

Upon receipt of such petition, the Arbitration Review Board shall review the decision of the panel arbitrator to determine whether grounds for appeal exist. If not, the Board will so inform the parties. If so, the Board shall review the decision of the panel arbitrator making whatever changes are necessary to assure that the final decision correctly resolves all contractual questions and issues presented, and is consistent with prior decisions of the Board. The Board's decision shall be made by majority vote and it shall issue its decision within fifteen

(15) days. Following review, the Board shall countersign its decision and transmit a copy to each party.

Section (d) Fifteen Day Limitation

Any grievance which is not filed by the aggrieved party within fifteen (15) calendar days of the time when the Employee reasonably should have known of it, shall be denied as untimely and not processed further.

Section (e) Earnest Effort to Resolve Disputes

An earnest effort shall be made to settle differences at the earliest practicable time. Where an Employee makes a complaint during work time, the foreman shall, if requested to do so, and if possible, consistent with continuous production, discuss the matter briefly on the spot.

Section (f) Employee's Right to Presence of Member of Mine Committee

Except where it will interfere with production, an Employee shall be entitled, at his request, to have a member of the Mine Committee present to assist him at any discussion with his foreman held pursuant to section (c)(2) of this Article.

Section (g) Right of Grievant to be Present

The grievant shall have the right to be present at each step of the grievance procedure until such time as all evidence is taken.

Section (h) Finality of Decision or Settlement

Settlements reached at any step of the grievance procedure shall be final and binding on both parties and shall not be subject to further proceedings under this Article except by mutual agreement. Settlements reached at

steps 2 and 3 shall be in writing and signed by appropriate representatives of the Union and the Employer.

Section (i) Exclusion of Legal Counsel

Neither party will be represented by an attorney licensed to practice law in any jurisdiction in any of the steps of the grievance procedure except by mutual agreement applicable only to a particular case.

Section (j) Expenses of Chief Umpire and Panel Umpires

The expenses of the chief umpire, and his necessary office and staff expenses will be shared equally by the BCOA and the UMWA.

Section (k) Circulation of Approved Decisions

Panel arbitrators shall be furnished promptly with copies of all decisions entered by the Board. The chief umpire through his staff shall prepare a looseleaf binder which shall contain summaries of the Board's decisions with respect to contractual issues arising under the Agreement. The binder shall be organized along the lines of the Agreement and shall be indexed by subject matter and case title. The binder shall be maintained by the chief umpire through his staff on a current basis and copies of any pages changed to reflect new decisions shall be provided to the parties on a monthly basis.

Section (l) Waiver of Time Limits

By agreement the parties may waive the time limits set forth in each step of the grievance procedure.

Section (m) Settlement of Differences or Disputes During the First Sixty Days of this Agreement

During the first sixty (60) days of this Agreement, or thereafter by a mutually agreed extension, the parties

hereto agree to resolve differences or disputes covered by this Article in accordance with the Settlement of Disputes provisions of Article XVII of the National Bituminous Coal Wage Agreement of 1971 which is adopted and incorporated herein by reference.

APPENDIX D

Cases pending in the United States District Court for the Southern and Northern Districts of West Virginia in which United Mine Workers of America labor organizations are being sued for damages on account of work stoppages caused by the appearance of stranger pickets.

Southern District

No.	Civil Docket No.	Plaintiff(s)
1	72-333 CH	U.S. Steel Corp.
2	72-1340 BL	U.S. Steel Corp.
3	72-1398 BL	U.S. Steel Corp.
4	72-1407	U.S. Steel Corp.
5	72-1451 BL	U.S. Steel Corp.
6	72-2985 HN	U.S. Steel Corp.
7	73-21 BL	U.S. Steel Corp.
8	73-22 BL	U.S. Steel Corp.
9	73-64 BL	U.S. Steel Corp.
10	73-355 CH	Westmoreland Coal Co.
11	74-11 BL	U.S. Steel Corp.
12	74-18 BL	U.S. Steel Corp.
13	74-19 BL	U.S. Steel Corp.
14	74-79 CH	Armco Steel Corp.
15	74-81 CH	U.S. Steel Corp.
16	74-95 CH	U.S. Steel Corp.
17	74-96 CH	Amigo Smokeless Coal Co., et al.
18	74-156 CH	U.S. Steel Corp.
19	74-245 CH	U.S. Steel Corp.
20	74-273 CH	Central Coal Co.
21	74-282 CH	Bethlehem Mines Corp.
22	74-289 CH	U.S. Steel Corp.
23	74-342 CH	Central Appalachian Coal Co., et al.
24	74-370 CH	Bethlehem Mines Corp.
25	74-449 CH	Southern Appalachian Coal Co.
26	74-469 CH	Youngstown Mines Corp.
27	74-523 CH	Armco Steel Corp.
28	74-524 CH	Southern Appalachian Coal Co.
29	74-525 CH	Bethlehem Mines Corp.

No.	Civil Docket No.	Plaintiff(s)
30	74-528 CH	Bethlehem Mines Corp.
31	74-529 CH	Island Creek Coal Co.
32	74-538 CH	U.S. Steel Corp.
33	74-545 CH	Youngstown Mines Corp.
34	74-546 CH	Cannelton Industries, Inc., et al.
35	74-547 CH	Ranger Fuel Corp.
36	74-550 CH	Allied Chemical Corp.
37	75-0283 CH	Armco Steel Corp.
38	75-0286 CH	Eagle Coal & Dock Co.
39	75-0311 CH	National Coal Mining Co.
40	75-0325 CH	Sycamore Mining Co.
41	75-0330 CH	Pond Creek Coal Co.
42	75-0494 CH	Carbon Fuel Co.
43	75-0499 CH	Brushy Fork Mining Co.
44	75-0533 CH	Youngstown Mines Corp.
45	75-0538 CH	Olga Coal Co.
46	75-0541 CH	U.S. Steel Corp.
47	75-0544 CH	Westmoreland Coal Co.
48	75-0546 CH	U.S. Steel Corp.
49	75-0562 CH	U.S. Steel Corp.
50	75-0563 CH	Armco Steel Corp.
51	75-0566 CH	Westmoreland Coal Co.
52	75-0572 CH	Bethlehem Mines Corp.
53	75-0585 CH	Westmoreland Coal Co.
54	76-0018 CH	Snapcreek Coal Co.
55	76-0019 CH	Elkay Mining Co.
56	76-0021 CH	Elkay Mining Co.
57	76-0050 CH	Brushy Fork Mining Co.
58	76-0314 CH	U.S. Steel Corp.
59	76-0317 CH	Armco Steel Corp.
60	76-0318 CH	Bethlehem Mines Corp.
61	76-0327 CH	Norma Coal Co., et al.
62	76-0333 CH	Cannelton Industries, Inc.
63	76-0476 CH	U.S. Steel Corp.
64	76-0111 CH	Youngstown Mines Corp.
65	76-0112 CH	Armco Steel Corp.
66	76-0117 CH	Bethlehem Mines Corp.
67	76-0120 CH	Omar Mining Co.
68	76-0121 CH	Cannelton Industries, Inc.

No.	Civil Docket No.	Plaintiff(s)
69	76-0122 CH	Cannelton Industries, Inc.
70	76-0140 CH	Southern Appalachian Coal Co.
71	76-0141 CH	Eastern Associated Coal Corp.
72	76-0142 CH	Eastern Associated Coal Corp.
73	76-0163 CH	Hawks Nest Mining Co.
74	77-2048 CH	Consolidation Coal Co.
75	74-297 CH	Island Creek Coal Co.
76	75-0108 CH	Island Creek Coal Co.
Northern District		
77	75-189-E	Bethlehem Mines Corp.
78	75-180-E	Bethlehem Mines Corp.
79	75-176-E	Southern Ohio Coal Co. and Ohio Power Co.
80	74-279-E	Island Creek Coal Co.
81	74-275-E	Consolidation Coal Co.
82	74-278-E	Badger Coal Co.
83	75-191-E	Consolidation Coal Co.
84	75-179-E	Consolidation Coal Co.
85	75-8 W	Windsor Power House Coal Co.
86	75-9 W	Consolidation Coal Co.
87	74-32 W	Windsor Power House Coal Co.
88	74-14 C	Windsor Power House Coal Co. and Bethlehem Mines Corp.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-796

INTERNATIONAL UNION, UNITED MINE WORKERS, OF AMERICA ET AL., *Petitioners,*

v.

CEDAR COAL COMPANY AND SOUTHERN OHIO COAL COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS, CEDAR COAL COMPANY AND SOUTHERN OHIO COAL COMPANY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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January, 1978

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INDEX

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Respondents Cedar Coal Company and Southern Ohio Coal Company join in the prayer of the petitioners for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 6, 1977, but without the self-imposed limitations incorporated in the prayer of the petitioners seeking review of "part" of

the judgment of the United States Court of Appeals for the Fourth Circuit. Respondents urge that the decision of the Fourth Circuit illustrates the absolute necessity for clarification of application of *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U.S. 397 (1976), to collective bargaining agreements containing implied no-strike contracts, in general, and to the recurring wildcat strikes in the coal industry, in particular.

QUESTION PRESENTED

Respondents do not agree with the petitioners' statement of the question presented. Properly, the question presented is as follows:

> Can a federal district court issue injunctive relief against a local union which is engaged in a strike at a particular work site by refusing to cross the picket line of fellow members of the same international union if the refusal is in support of an illegal strike over an issue which is arbitrable under the single collective bargaining agreement covering both the union members who are picketing and those who refuse to cross the picket line, and the purpose of the picketing and strike is to compel the concession of that arbitrable issue?

STATEMENT OF THE CASE

The work stoppage involved in this case, which idled over 100,000 miners and caused the shutdown of most of the bituminous coal mines in the seven eastern bituminous coal producing states, was precipitated by less than 200 miners at one mine of the respondent Cedar Coal Company located in Kanawha County, West Virginia, approximately 150 miles from the Martinka Mine of respondent Southern Ohio Coal Company.

Respondent Southern Ohio Coal Company (Southern) operates the Martinka Mine in Marion County, West Virginia. Local 1949 of the United Mine Workers of America represents the production and maintenance workers at Martinka. Southern is a signatory to the National Bituminous Coal Wage Agreement of 1974 with the United Mine Workers of America (UMWA), of which Local 1949 and District 31 are members. Respondent Cedar Coal Company (Cedar) is likewise a signatory to the National Bituminous Coal Wage Agreement of 1974 and operates in Boone and Kanawha counties, West Virginia, within the jurisdiction of District 17, and Locals 1759 and 1766, UMWA. Both Cedar and Southern are coal-producing subsidiaries of American Electric Power Company, and both supply coal to its many power-generating plants.

The strike in this case commenced at Cedar Coal Company, at its Local 1759 operation, in early July, 1976. It began, concededly, over a clearly arbitrable issue. Additional issues arose, which were either also clearly arbitrable, or related to actions taken by Cedar in United States District Court to enjoin the original strike in support of the arbitration process. By July 20, 1976, the strike had been spread by pickets to the Cedar operations under the jurisdiction of Local 1766, UMWA.

Cedar sought and obtained a temporary restraining order against Local 1759, but was refused preliminary injunctive relief. When it sought a temporary restraining order against Local 1766, the relief was denied,

and the complaint dismissed for failure to state a claim. Cedar appealed both cases.

The wildcat strike began at Southern's Martinka Mine at 12:01 a.m. on July 26, 1977, when the employees scheduled to work were met at the mine access road by pickets who passed out handbills which read as follows:

> "UMWA STRIKE AGAINST INJUNCTIONS
>
> "UMWA LOCAL UNION 1759, CEDAR COAL COMPANY HAS A FEDERAL INJUNCTION AGAINST THEM. THEY ARE BEING FINED $50,000 AND $25,000 A DAY FOR STRIKING.
>
> "WE ARE SICK AND TIRED OF THE FEDERAL COURTS TAKING THE SIDE OF THE COAL OPERATORS. HUNDREDS OF LOCALS ALL THROUGHOUT THE COAL FIELDS KNOW HOW UNJUST THE USE OF FEDERAL INJUNCTIONS ARE.
>
> "ALL UMWA MINERS ARE ASKED TO STRIKE TO STOP THE INJUNCTIONS AND TO END ALL FINES AND SENTENCES.
>
> "Paid for by UMWA members, combined miners,
>
> Robert Nelson, Chairman"

The Southern employees at Martinka Mine refused to work.

At a hearing conducted as a result of Southern's suit against the UMWA, District 31 and Local 1949 under 29 U.S.C. § 185, seeking injunctive relief and damages, the district court found that the pickets were members of the UMWA but were not members of Local 1949. The district court then concluded that the refusal of the Martinka employees was due to fear or respect for picket lines or for other reasons which were not identified by the court. Denying Southern's motion for a preliminary injunction or, in the alternative, a temporary restraining order, the district court relied upon *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U.S. 397 (1976).

Southern appealed from the denial of injunctive relief and applied for an injunction pending appeal. This appeal was consolidated with those of Cedar.

The United States Court of Appeals for the Fourth Circuit, relying upon *Buffalo Forge,* sustained the denial to Southern of a preliminary injunction or a temporary restraining order; ordered arbitration under the 1974 Agreement of the issue of whether the Local 1949 might be required to cross the picket line as a condition to proceeding with the damage aspects of the case; and remanded the case to the district court. The Cedar cases were also remanded, with arbitration ordered in the case of Local 1766.

As indicated by the Fourth Circuit's decision, the purpose, intent and effect of the strikes by both Locals 1759 and 1766 was to coerce Cedar to resolve admittedly arbitrable issues. As shown above, that, too, was the clear intent of the pickets whose line the employees of Southern honored. Thus, while, as indicated by the Fourth Circuit, Southern "could concede nothing to Local 1759, . . . and there was no dispute between Southern and Local 1759," [560 F.2d at 1172] the purpose of the picketing there, and thus the effect of the strike by 1759, was to coerce the concession of an admittedly arbitrable issue by Cedar, and, if it arose, by Southern.

The UMWA has petitioned for a writ of certiorari seeking only partial review. Southern Ohio Coal Com-

pany and Cedar Coal Company pray that a writ of certiorari be issued to review the entire decision of the Fourth Circuit.

REASON FOR GRANTING THE WRIT

The Decision Below With Regard to Southern Ohio Coal Company is Contrary to Federal Labor Policy And Was Not Required by Buffalo Forge.

The Court of Appeals concluded, despite the absence of any holding by the district court that the strike by Local 1949 was out of sympathy for Local 1759's situation at Cedar Coal Company, and despite the possibility that the underlying purpose of Local 1949's strike may have been to put pressure upon Cedar to concede an arbitrable issue to Local 1759, eventually benefiting Local 1949, that injunctive relief was not appropriate. The apparent basis for the denial of injunctive relief to Southern is *Buffalo Forge*. However, reliance upon *Buffalo Forge* is inapposite when a factual analysis of the position of Southern vis-à-vis Local 1949 is undertaken.

By its apparent holding that a strike which may have been in sympathy with an illegal strike over an arbitrable dispute under a common labor agreement cannot, as a matter of law, constitute a breach of contract absent an express no-strike clause, the decision of the Court of Appeals not only misinterprets this Court's decision in *Buffalo Forge,* but also significantly and adversely affects the basic national policy favoring peaceful resolution of industrial disputes as a substitute for economic strife. Further, the decision exposes an entire industry and its employees to the whims of a few dissident employees.

In *Buffalo Forge,* this Court held that notwithstanding the arguable illegality of a strike in sympathy with a concededly legal primary strike to secure a labor agreement, such a sympathy strike was not enjoinable in federal court pending arbitration of its legality under a labor agreement containing an express no-strike clause. The Court concluded that the accommodation of policy favoring arbitration to the anti-injunction provisions of Norris-LaGuardia, as articulated in *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970), limited the jurisdiction of federal courts to issue injunctions to those cases where the arbitral process was jeopardized. Vindication of the arbitral process by an injunction pending arbitration was therefore unnecessary in *Buffalo Forge,* where the union offered to arbitrate the legality of the strike, since the purpose of the strike was not to coerce the settlement of a arbitrable issue, but instead to coerce settlement of an admittedly unarbitrable one. That strike was termed a "sympathy" strike, *i.e.,* not one which sought to coerce the settlement of an arbitrable issue or deprive the employer of its bargain.

The walkout by Local 1949 was not, however, a "sympathy" strike within the application of *Buffalo Forge.* Substantnal factual differences between the Martinka walkout and the *Buffalo Forge* strike exist. Succinctly stated, these differences are as follows:

> A. At Buffalo Forge Company, there was a legal primary strike, plus a strike in admitted sympathy with the goals of that legal primary strike. However, the stranger picket line at Martinka was the result of an illegal strike over an arbitrable dispute at Cedar Coal Company.

B. Two distinct labor contracts and bargaining units were involved in *Buffalo Forge,* whereas one labor contract, the National Bituminous Coal Wage Agreement of 1974, applied to both locals at Cedar, as well as Local 1949 at Southern's Martinka Mine.

C. The National Coal Wage Agreement of 1974 contained both a broad arbitration provision and the union's promise to maintain the integrity of the contract by complete reliance upon arbitration for settlement of all disputes. Such language was not contained in the agreement between Buffalo Forge Company and the Union.

D. In *Buffalo Forge,* the sympathy strikers had no direct or beneficial interest in the outcome of the primary strike; but at Martinka Mine the Local 1949 strikers stood to benefit by extending and supporting the illegal primary strike, as is illustrated by the fact that the stranger pickets' handbills advised of the federal injunction against Cedar Coal Local 1759 and asked for "ALL UMWA MINERS . . . TO STRIKE TO STOP THE INJUNCTIONS AND TO END ALL FINES AND SENTENCES."

E. Most importantly, in *Buffalo Forge* one employer with separate labor contracts distinct from those within its industry was struck. However, Martinka Mine was but one mine of many, all with the same labor agreement, struck throughout the eastern coal fields in an effort to coerce a party to that agreement (Cedar) to concede an arbitrable existing dispute which is equally arbitrable to all such employers, including Southern, with a consequent like effect on all employers signatory to that agreement.

These factual differences, when coupled with the mandate of the Labor-Management Relations Act of 1947 requiring settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement by the method agreed upon by the parties, take the Martinka dispute out of the ambit of *Buffalo Forge.* The petitioners, as signatories to the National Bituminous Coal Wage Agreement of 1974, bound themselves to arbitrate all issues between such signatories.

Furthermore, from the record it seems clear that the Local 1949 strikers were not out in "sympathy" with the Cedar Coal locals. Southern is a member of a multi-employer bargaining unit. *United Mine Workers,* 179 NLRB 479, 72 LRRM 1426 (1969). There is but one national agreement, and that agreement contains an arbitration procedure designed to assure uniformity in interpretation and application. All members of the union employed by signatories to the agreement, including Cedar and Southern, are obligated to abide by the same contractual grievance-arbitration procedures of the one agreement extant between the parties. Under those circumstances, whenever, as here, any local of the union initiates a strike over an interpretation or application of the national agreement, and other locals of the same union refuse to work to support the initial strikers' demand, all of them are striking over a dispute in which they have a common interest, and with a common intent to will a common result to that dispute. Hence, this was no sympathy strike, for as noted by Justice Stevens in the dissent to *Buffalo Forge,* a sympathy strike "does not directly further the economic interests of the members of the striking local or contribute to the resolution of any dispute between that local, or its members, and the employer." [428 U.S. at 429].

Although the UMWA, its attorneys, and a number of federal district judges have construed *Buffalo Forge* as effectively overruling *Boys Markets, Inc.* v. *Retail Clerks Local* 770, 395 U.S. 235 (1970), rendering it inapplicable to "stranger picketing" in the coal industry even when that picketing is over arbitrable issues, respondents believe that the Court, upon examination and comparison of the situation presented in this case, will conclude that *Boys Markets* is still applicable and available as a remedy against wildcat strikes in the coal industry. There are significant and controlling differences between the sympathy strike which this Court held unenjoinable in *Buffalo Forge* and the widespread wildcat strikes in the coal industry where picketing is undertaken over clearly arbitrable issues. *Buffalo Forge* cannot continue to be interpreted in the coal fields as a bar to federal injunctive relief and a license to dissident UMWA members to strike over clearly arbitrable disputes.

CONCLUSION

As a result of the Fourth Circuit's erroneous application of *Buffalo Forge* in the decision below and similar holdings by the Third, Sixth and Seventh Circuits, respectively, in *United States Steel Corp.* v. *United Mine Workers,* 548 F.2d 67 (3rd Cir. 1976), *Southern Ohio Coal Co.* v. *United Mine Workers of America,* 551 F.2d 695 (6th Cir. 1977), and *Ziegler Coal Co.* v. *Local Union No. 1870, United Mine Workers of America,* —— F.2d ——, 96 LRRM 3360 (7th Cir. 1977), the contractual grievance and arbitration machinery has become a nullity for employers in the coal industry. These employers continue to have their mines shut down by roving, unidentified pickets who travel

throughout the coal-producing states precipitating frequent and protracted strikes over issues which properly should be settled by arbitration. Yet no judicial relief has been available to these employers because of the seeming reluctance of the federal court system to properly apply *Buffalo Forge* to the wildcat strikes of the coal industry. As a consequence, coal production has been significantly reduced, with consequent economic devastation not only to the coal industry, but also to the union, the families of the miners and the miners' and pensioners' and widows' pension and health funds.

The applicability of *Buffalo Forge* to wildcat strikes in the bituminous coal industry is thus of paramount importance to the industry, the union and an energy-conscious nation. Clarification of the issue is appropriate and necessary. Certiorari for that purpose should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-796

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Petitioners

v.

CEDAR COAL COMPANY and SOUTHERN OHIO COAL COMPANY,

Respondents

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITIONERS' REPLY

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PETITIONER'S REPLY

1. *Additional Authority.* Since the preparation of the Petition, the U. S. Court of Appeals for the Seventh Circuit in *Zeigler Coal Co.* v. *Local 1870, UMWA,* 96 LRRM 3360, 3362-2, (No. 76-2113, Dec. 1- 1977) followed the positions of the Sixth Circuit stated in *Southern Ohio Coal Co., UMWA,* 551 F.2d 703, 715 (1977), cert. denied 46 USLW 3219 (October 4, 1977), and of the Third Circuit stated in *U. S. Steel* v. *UMWA,* 548 F.2d 67, 73 (1976), cert. denied 45 USLW 2318 (June 13, 1977), discussed at pages 13-14 of the Petition. The rationale of the *Ziegler* decision is virtually identical to the rationale adopted by those two circuits, and is not repeated here.

2. *Review of the question of the availability of injunctive relief raised in Respondents' brief, and not in the Petition, is improper because: (i) the issue was not raised by a timely petition for certiorari, and (ii) the record is totally inadequate for review of that interlocutory question.*

Petitioners seek certiorari solely for review of the directive of the Court of Appeals found in part IX of its opinion (A-40 to A-41) to arbitrate the picket line question as a prelude to trial of the strike damages question. See Petition pp. 1, 4, 6, esp. 4. The Petition does not seek review of any questions relating to injunctive relief. Those questions were discussed separately in part X of the opinion of the Court of Appeals (A-31 to A-40).

Both the damage and injunction issues are undeniably interlocutory. Petitioners justify review of the interlocutory damage question because the challenged portion of the opinion of the Court of Appeals will have a substantial and erroneous impact on the administration of justice. See Petition, item III, pp. 15-16. Respondents neither acknowledge the interlocutory nature of the question they improperly attempt to raise, nor suggest any justification for review at this stage of the proceedings.

The record is totally inadequate for review of the interlocutory questions posed by Respondents. Review of the injunction question is particularly inappropriate in the absence of any finding of fact as to what issue the pickets were promoting or, as to the Cedar Coal case,[1]

[1]As was done in the Petition, Petitioners at times will refer to themselves as the "unions", to the Respondents as the "coal operators" and to the two cases for which certiorari is sought as the "Cedar Coal case" and the "Southern Ohio case" (per note 1 at p. 2 of the Petition). A third case involving Cedar Coal and Local 1759, discussed by Respondents, is mentioned at note 2 p. 3 of the Petition, but is not discussed herein as certiorari is not sought as to any issue in that case. See notes 26 & 27 at p. 15 of the Petition.

any ruling as to why miners would not cross the picket lines.[2] The central and crucial factual premise of the Respondent coal operators arguments—that the stoppages which spread from the original coal mine to other mines were an attempt to settle the original arbitrable dispute[3]—was never the subject of any findings of fact and is supported only by Respondents' affidavits and argument and not by any reviewable fact findings. Petitioners have consistently and emphatically disputed causes of the stoppages in both the Cedar Coal and Southern Ohio cases.

Respondents' "brief" is an untimely and improper independent petition for certiorari. Respondents attack a portion of the opinion of the Court of Appeals not challenged by the Petition. Respondents do not argue for or against Petitioner's position. Respondents arguments amount, instead, to a completely new position which could have been, but was not, presented by a timely[4] petition, cross-petition, or conditional petition

[2]Even the informal interlocutory finding, made for the purpose of denying the coal operator's motion for a preliminary injunction in the Southern Ohio case, did not specify why the miners represented by Local 1949 when confronted with stranger picket lines did not work. The District Court ruled that the miners did not cross the picket lines "perhaps from fear or perhaps from exercise of a right not to cross picket lines, or perhaps for other reasons . . ." .A-13.

[3]See Respondents' Brief: p. 2, second full paragraph; p. 3, second full paragraph; p. 5, third full paragraph; p. 7, last three lines; p. 8, item E.

[4]Although Respondents were obviously aggrieved by the ruling of the Court of Appeals that the stoppage in the Cedar Coal case was not enjoinable (A-40), they did not petition for rehearing of that, or any other, question. Neither party sought an extension of the ninety day period for filing of a petition established by 28 USC 2101(c). That period expired December 7, 1977, ninety days after the union's petition for rehearing was denied by the Court of Appeals on or about September 6, 1977. Respondents filed their brief on or about January 4, 1978.

for certiorari. Stern & Gressman, *Supreme Court Practice* § 6.44, p. 310 (4th ed., 1969); 1 *West's Federal Practice Forms, Supreme Court,* 668 (Boskey ed., 1969). It is respectfully submitted that the new and completely separate issue raised in Respondents' Brief should not be considered because it was not raised by a timely petition. See *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 109 n. 4 (1974); *Alaska Industrial Board* v. *Chugach Assn.*, 356 U.S. 320, 325 (1958); Stern, supra, at 315, Boskey, supra., at 612.

The title of Respondents' Brief, "in support of . . ." the Petition, is misleading. The Respondent-Coal Operators do not actively urge granting of certiorari on the question framed by the Petitioner-Unions. The parties are unquestionably in sharp disagreement over the separate issue of the availability of injunctive relief raised by Respondents.[5] Furthermore the device of using Respondents' brief to raise an entirely new issue denies Petitioners any effective opportunity to fully respond.[6]

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[5]The unions believe, in part for the reasons stated by the Third and Sixth Circuits and most recently by the Seventh Circuit, see p. 1 supra. and pp. 13-14 of the Petition, that the Court of Appeals for the Fourth Circuit correctly upheld the denial of injunctive relief. The coal operators disagree for the reasons stated in their Brief.

[6]This is particularly true as to the effect of the arguments made by amicus-BCOA which complement and expand Respondents' position. Petitioner has no meaningful opportunity to respond to the expansive factual assertions made by amicus, many of which are either incorrect, entirely outside the record, or both. In particular, the premise of the amicus brief—that the stoppage spread in an attempt to force the settlement of an arbitrable issue (see BCOA brief pp. 9, 13, 14, 15, 20, 23, especially 22)—is not supported by any fact findings and is flatly denied by petitioners. See text at note 3, supra.

CONCLUSION

For the uncontroverted reasons stated in the original Petition, Petitioners respectfully pray that certiorari be granted and the Court review the issue framed by the Petition.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF AMICUS CURIAE OF THE BITUMINOUS COAL OPERATORS', INC.

BCOA'S INTEREST

Permission of all parties has been obtained to the filing of the Brief. Copies of letters attached.

The Bituminous Coal Operators' Association, Inc., herein called "BCOA", is a national association of coal operators, organized in 1950 for the purpose of negotiating and assisting in interpreting BCOA's na-

tional agreements with the United Mine Workers of America, herein called "UMWA". BCOA has approximately 50 members who operate in all of the bituminous coal mining states and who collectively produce approximately 75 percent of the bituminous coal mined under the National Bituminous Coal Wage Agreement of 1974, herein called the "1974 Agreement".

BCOA was formed in 1950 against the backdrop of the labor strife in the coal industry during the 1940's, a period characterized by strikes and Government seizures of the coal mines. BCOA's purpose was to create more stable labor relations and to establish and maintain harmonious relationships between the coal operators and their employees and their employee representative, the UMWA. These efforts were successful for a period of time in that since the early 1950's, a succession of national labor agreements have been negotiated between BCOA and the UMWA without any seriously prolonged or crippling economic strikes. However, during recent years, particularly from 1974 to the present, escalating wildcat strikes have created labor chaos in the coal industry.

The latest contract renewal was the 1974 Agreement which became effective in December 1974 to run for a three-year period. The 1974 Agreement has now expired, and the parties are engaged in negotiating a new agreement. The 1974 Agreement was hailed as one of the most progressive labor agreements ever negotiated. It provided for wage and benefit levels which were at least as beneficial to the miners as those in any other industry. It alsc contained provisions for the handling of grievances and for various types of expedited arbitration over a broad range of issues. All local grievances, disputes or local trouble of any kind were subject to final and binding settlement through the grievance-arbitration procedures of the Agreement. There is no labor agreement of record that contains any broader grievance-arbitration clause.

The provisions for grievance handling and arbitration in the 1974 Agreement were not moribund. They were alive and functioning. Between September 1975 and August 1976, over 2,000 grievances had been submitted to arbitration under the 1974 Agreement. This is in contrast to earlier years when about 600 to 700 grievances were arbitrated each year. The grievance-arbitration procedures were equitable and readily available to the miners, and they were being used by the vast majority of the coal miners. One new feature of the arbitration process added in 1974 was the provision for a National Arbitration Review Board established for the purpose of reconciling conflicts in panel arbitrators' decisions and for bringing about uniformity in the interpretation of the National Agreement.

But, unfortunately, there are coal miners who from time to time take the law into their own hands and engage in and foster wildcat strikes over an arbitrable local grievance or dispute. These local strikes are becoming more frequent and escalating into widespread national wildcat strikes. Such escalation is normally accomplished by roving "stranger" pickets, and these sporadic wildcat strikes sometimes involve 50 percent or more of the UMWA miners.

Despite the bright promise of the 1974 Agreement, labor stability in the coal industry has steadily worsened since that Agreement was signed. There were

more wildcat strikes in the bituminous coal industry in 1975 than ever before, and 1976 was even worse. There was also a long and even more destructive wildcat strike in 1977 lasting about 8 weeks. The losses due to this 1977 wildcat strike were staggering. For BCOA members alone, about one and a quarter million man days were lost. The tonnage loss was over 11 million tons; payroll losses to miners were almost 78 million dollars; and the losses of employer contributions to the Pension and Health Funds were about 25 million dollars. The ability of the bituminous coal industry to meet the nation's increasing fuel requirements was, and continues to be, placed in jeopardy.

The wildcat strike that gave rise to this litigation in the Fourth Circuit and other Circuits took place in 1976, and lasted about 6 weeks, engulfing all or part of the major coal producing states. It is estimated that about 125,000 coal miners were idled by this wildcat strike which started at a single mine of Cedar Coal Company in West Virginia, arising out of a single dispute over the proper classification of one small job.

This local dispute was over a clearly arbitrable issue, and was in fact arbitrated. Yet it was the precipitating cause of the shutdown of about two-thirds of the total national production of bituminous coal. It inflicted severe losses on the coal miners, the coal industry, the Benefit and Pension Funds, the coal communities, the coal states, and the Nation.

Apart from the other astronomical economic losses arising from these wildcat strikes, they pose an imminent threat to the pension and health benefits of the active miners and the 80,000 pensioners.

In the 1974 Agreement, the mine operators agreed to double their contributions to these Trust Funds and to dramatically increase the pensions both for present pensioners and for the future pensions of active miners. The health and medical benefits plans in the bituminous coal industry are among the most liberal in the Nation.

But, the contributions to these Trust Funds by employers are based on a combination of tons of production and cents per hour for hours actually worked. Consequently, their financial stability has been threatened by the rising level of wildcat strikes to the point where the Pension and Health Trusts have been all but destroyed. Only the 1974 Pension Trust is in a viable position. The Board of Trustees, the Chairman of which is appointed by the UMWA, has issued public statements giving warning of the damage to the Trust Funds arising from the recurring incidence of wildcats. But these warnings have been repeatedly ignored while the wildcatting continues to run rampant, depleting and destroying the Pension and Health Benefit Funds. This kind of self-destructive anarchy in the Union must somehow be curbed.

BCOA and its members have a grave and continuing interest in preserving the integrity of the periodic agreements negotiated with the UMWA.

BCOA and its members also have a grave and continuing interest in preserving the grievance-arbitration procedures of those agreements and in maintaining employment stability and production in the bituminous coal industry. BCOA and its members have a similar direct interest in the stability of the Pension and Benefit Trusts. BCOA believes that these interests should be shared by the UMWA and its members and constituent

bodies throughout the industry; and finally, the threat which wildcat strikes present to these interests should be the concern of the public as well.

Recurring and escalating wildcat strikes, to our knowledge, are rare in other industries, but are a serious and mounting threat to the stability of the coal industry.

BCOA is dedicated to encouraging the use of the grievance-arbitration procedures of the Agreements to settle disputes, and generally these procedures were being used. BCOA knows of no instance where a mine operator has failed or refused to arbitrate a local dispute of any kind. The problem of the wildcat strike arises where a few strong-willed men, for reasons known only to them, flaunt these procedures, and engage in spreading wildcat strikes.

These wildcat strikes are usually spread by roving, or "stranger", pickets. In the normal case, as is true here, these "stranger" pickets conceal their identities. They are aided in their destructive conspiracy by the tradition of UMWA members to cease work whenever a picket or pickets appear at their mines, regardless of from whence they come, their identities, or the equity or lack thereof of their cause. Thus is the stage set for a handful of men to create havoc and industrial anarchy in the bituminous coal industry.

BCOA does not believe in or advocate the settlement of labor disputes in the courts. BCOA encourages the settlement of disputes by the grievance-arbitration procedures of the agreement. BCOA is aware that some miners in West Virginia have attacked the courts and have attacked the industry for taking court action against wildcat strikes. BCOA can only say that these

attacks are unwarranted and based on distorted reasoning. In the bituminous coal industry, until the coal miners accept it, the grievance-arbitration system, as experience has shown, will not work without the aid of the courts. BCOA members have only gone to the courts in order to attempt to channel arbitrable issues away from the picket line and into the peaceful procedures which were mutually agreed upon between BCOA and the UMWA. Recourse to the courts to preserve the integrity of the agreement has always been a last resort. But it is at times a necessary one. Without the courts, resort to arbitration will be voluntary, although written as mandatory; and wildcat strikes will go unchecked until they destroy any value of the national agreements, which all parties have pledged themselves to uphold, and until they undermine the stability of employment and production in the bituminous coal industry.

Because of its direct and overriding interest in improving labor relations, promoting labor peace, insuring stability of employment, and encouraging respect for the agreement, BCOA files this brief to respectfully bring to the attention of this Court the scope and seriousness of the issues which are here brought before it.

Without intent to overstate, BCOA believes that the future stability of labor relations and employment in the bituminous coal industry, the future of the United Mine Workers, and the future of the concept of a national labor agreement, will, to a large extent, depend upon the ultimate resolution of the issues here presented.

The Nature of Wildcat Strikes in the Coal Industry

Wildcat strikes, as did this one, typically start with a strike at a mine over some grievance or dispute which

is clearly arbitrable under the national agreement. The local union, or a union member, chooses not to arbitrate and goes on strike. One or more men walk out and the others blindly follow. The mine is then on strike. Unless the strike is spread by roving pickets, the single mine strike normally lasts a day or two and the men return to work. Several wildcat strikes like these occur without fail nearly every day.

The second phase of a typical wildcat strike occurs when the strikers at the originating mine fan out and picket out other mines. They do not necessarily picket openly, but often covertly. The pickets do not carry signs or openly proclaim their cause. They do not picket in the customary sense. They come to a mine in roving caravans, shut it down, and move on to another mine, returning later, if necessary, to shut it down again. Their tactics are successful largely because of the miners' tradition of ceasing work when a "picket" appears at their mines. Fear also plays its part. It is common practice for the miners at a mine closed by roving pickets to in turn picket out neighboring mines so that there is a growing momentum and a snowballing effect. This explains why in the work stoppage giving rise to this case (August 1976) fewer than 200 miners at one mine of Cedar Coal Company in Boone County, West Virginia, and a few other "right to strike" leaders in that UMWA District, did, within a few days, cause the shutdown of most of the bituminous coal mines in the seven bituminous coal producing states and idled about 125,000 miners.

We now turn to a discussion of the case presently before this Court.

QUESTION PRESENTED

BCOA adopts the statement of the question presented by Respondents in their response to the Petition for a Writ of Certiorari.

Perhaps more simply stated the question is:

> Whether a wildcat strike in the bituminous coal industry—precipitated over an arbitrable issue—is enjoinable against all local unions participating in the strike where all local unions and their members have a direct interest in the underlying arbitrable dispute by reason of the existence of a single multi-employer unit and a multi-employer agreement containing terms and provisions common to all, one of which provisions is for the processing and eventual arbitration of labor disputes, through panel arbitration, up to a national Arbitration Review Board.

STATEMENT OF THE CASE

The present Fourth Circuit case involved three consolidated proceedings, which in tandem present the three stages of a typical wildcat strike in the coal industry.

The wildcat strike started at Grace Mine No. 3 of Cedar Coal Company in protest against an arbitrator's decision which the local Union had won in large part. The date was June 22, 1976, and the local was Local 1759. Cedar Coal employees at two other mines owned by Cedar represented by Local 1766 also went on strike over the "dispute".

As already stated, roving pickets spread this strike from there throughout the coal industry, shutting most of it down for several weeks. One of the many mines

which was shut down by the roving pickets was the Martinka Mine of Southern Ohio Coal Company, located in Marion County, West Virginia. The work stoppage at the Martinka Mine started on July 26, and was caused by twelve to fifteen roving pickets who passed out handbills referring to the Cedar Coal dispute and condemning the Federal Courts. The miners at the Martinka Mine refused to work and joined the strike.

Both Cedar Coal Company and Southern Ohio Coal Company appealed to the Federal District Courts for injunctive relief under *Boys Markets,* 398 U.S. 235 (1970), with only very limited success. A District Judge granted a temporary restraining order against Local 1759, but it was ignored and not enforced. A District Judge denied a request for a temporary restraining order against Cedar Local 1766, primarily on the ground that the strike was a "sympathy" strike under *Buffalo Forge,* 428 U.S. 397 (1976). The District Court in the Southern Ohio Coal Company case denied an injunction on similar grounds.

Appeals were taken in all three cases to the Fourth Circuit, which issued its Opinion on all three cases on July 6, 1977.

The Court below held, in essential effect, that, "Our principal problem is to construe *Buffalo Forge* and apply it to the facts of these cases."

The Court below did so and concluded as follows:

1. That the strike by Local 1759 at Grace Mine No. 3 of Cedar Coal was over an arbitrable grievance, and that the strike "fell squarely" into *Boys Markets* and should have been enjoined. The Court rejected the Union's spurious contention that the original strike

changed its character and became a "political" strike against the Federal Courts.

2. That the strike by Local 1766 at the two other Cedar Coal mines was in furtherance of the goals of the original strike by Local 1759, and also enjoinable.

3. That the strike by Local 1949 at the Martinka Mine of Southern Ohio Coal did not fall within *Boys Markets* and was not enjoinable.

The court below remanded the cases involving Locals 1766 and 1949, with directions to the District Courts to order arbitration of the refusals of these locals to cross picket lines prior to proceeding with the damages aspects of the cases.

The Union has petitioned for review in the Local 1766 and 1949 cases, raising the question of the power of the court below to order arbitration. The Respondents are joining in the Petition but, as we are advised, are seeking a broader ruling on the applicability of *Buffalo Forge.* BCOA, as *amicus curiae,* joins Respondents in respectfully requesting the Court to grant the Writ and to consider the broader issue of the enjoinability of wildcat strikes in the bituminous coal industry under *Boys Markets,* read in context with *Buffalo Forge.*

REASONS FOR GRANTING THE WRIT

BCOA joins in the Petition for a Writ because it strongly urges the Court to review this case and to clarify *Buffalo Forge* as it applies to this recurring type of wildcat strike in the bituminous coal industry. The issue is certainly one of national importance, and there has developed something of a conflict in the Cir-

cuits. An expeditious resolution is imperative in the national interest.

Unlike other unionized industries where wildcat strikes are a rarity, the bituminous coal industry has become increasingly victimized by wildcat strikes arising over arbitrable disputes. This is despite the fact that the national agreement had one of the broadest and most available grievance-arbitration procedures in existence. Every contract dispute and "local trouble" of any kind was subject to grievance-arbitration. Moreover, as already stated, the 1974 Agreement provided for a national Arbitration Review Board to reconcile differences among panel arbitrators, and thus to bring about uniformity as to the meaning and interpretation of the national agreement.

By and large, the UMWA members observed and followed this procedure. But, on occasion, employees at a particular mine spurned these arbitration procedures and resorted to economic force to gain their demands. When this happens, a few recalcitrant men were able to spread the wildcat strike to other locals and to shut down an entire UMWA District, or an entire state, and even the entire bituminous coal industry.

The result has been disastrous. There have been regularly recurring wildcat strikes in the coal industry, and they have been escalating. It is not an overstatement to say that we are nearing industrial anarchy in the coal fields.

The ink was hardly dry on *Buffalo Forge,* which was issued on July 6, 1976, when on July 19, this particular strike broke out, first in West Virginia, over a grievance that was both arbitrable and arbitrated. It then spread rapidly throughout the industry. The local union

and its cohorts in the UMWA did not like the result of the arbitration and, by the use of roving pickets, shut down practically the entire industry for several weeks. The costs to all concerned were enormous and irremediable. Yet, for the most part, District Judges, overreacting to *Buffalo Forge,* refused either to issue or to enforce injunctions.

While this strike eventually came to an end, similarly destructive stoppages took place in 1977, with equally devastating effect, and there can be little doubt that this pattern and practice will continue unless something is done about it.

THE BUFFALO FORGE ISSUE

BCOA does not believe that the Court in *Buffalo Forge* intended to grant to a few willful men a roving license to destroy the bituminous coal industry, the coal miners, their Union, and their Pension and Health Funds, and to endanger the public welfare.

The District Courts and now some of the Circuit Courts have construed *Buffalo Forge* as having the effect of virtually overruling *Boys Markets* as applied to wildcat strikes in the bituminous coal industry. *U.S. Steel* v. *UMWA,* 548 F.2d 67 (3rd Cir. 1976); *Southern Ohio Coal Co.* v. *UMWA,* 551 F.2d at 703 (6th Cir. 1977); *Zeigler Coal Co.* v. *UMW Local 1870, et al.,* No. 76-2113 (7th Cir., Dec. 1, 1977). We do not believe this was the intent of the Court. *Buffalo Forge* reaffirmed the basic thrust of *Boys Markets* which endorses the use of the Federal Courts to uphold the sanctity of the arbitration process.

Buffalo Forge simply holds that where there is no underlying arbitrable dispute which is being under-

mined by a sympathy strike, *Boys Markets* does not apply.

There was no underlying arbitrable dispute in *Buffalo Forge*. In that case, there were two separate local unions representing two separate groups of employees in two separate bargaining units. One had its own separate contract and the other was negotiating one. The dispute over the negotiation of an agreement was not arbitrable, and the union striking in sympathy had no arbitrable dispute over than the sympathy strike itself.

Thus, there was no underlying arbitrable issue of any kind, and the majority held that for this reason the integrity of the arbitration process was not undermined or endangered by the sympathy strike.

Here, the strike started and spread over an arbitrable dispute. Since the original strike at the originating mine was arbitrable, the spread of the strike by roving pickets was designed solely to increase the pressure on the industry to yield. This undermined and threatened the integrity of the arbitration procedure and was, therefore, enjoinable against all participating locals.

The Position of BCOA on *Buffalo Forge*

BCOA respectfully submits that this case is clearly distinguishable from *Buffalo Forge*. Reduced to its bare bones, *Buffalo Forge* held that a "sympathy" strike is not enjoinable because of the proscriptions of Norris-LaGuardia against labor injunctions. *Buffalo Forge* defined a sympathy strike as one where one local union (having an on-going labor agreement and having no direct interest in the underlying dispute) ceases

work in "sympathy" with a sister local engaged in a legal, primary strike against a common employer.

In *Buffalo Forge,* the majority of this Court reasoned that since the "underlying" dispute between the striking local and the employer was not arbitrable, the "sympathy" strike was not "over" an arbitrable issue and, therefore, was not enjoinable under *Boys Markets.*

The mere statement of this ruling, read in context, sharply distinguishes *Buffalo Forge* from the typical wildcat strike in the bituminous coal industry. The question presented here could be put in these terms:

> Whether or not under *Boys Markets* a court which concededly can enjoin strikes over arbitrable grievances at their source, can also enjoin locals at other mines from striking to place increasingly mounting pressure on the particular employer and on the BCOA membership to forego their right to arbitration and to capitulate to the union's grievance?

To consider this question in proper context, it must be determined whether the strikes at other mines of the same and other employers are truly "sympathy" strikes in the meaning of *Buffalo Forge,* or whether they are merely extensions of the original economic pressure to force the employers, individually and collectively, to accept the union's interpretation of the National Agreement.

BCOA submits that this is the key to the entire issue.

Contrary to other Circuit Courts, the Fourth Circuit Court of Appeals showed some real understanding of the unique situation in the bituminous coal industry which is dominated by a single union with a national

agreement containing wages, benefits, terms and conditions of employment common to all companies signatory to that agreement and to all UMWA coal miners. But the court below stopped short of the logic of its own sound reasoning.

First, the court below correctly and without any real challenge held that the original strike by Local 1759 was over an arbitrable issue and indeed was in defiance of an arbitration award. It was, therefore, unquestionably enjoinable under *Boys Markets*.

Second, the Court held that the strike by Local 1766 at two other Cedar Coal mines was in furtherance of Local 1759's unlawful objective, and was also enjoinable. The Court reasoned thusly:

> "Here, the employer is the same as to both Locals; the collective bargaining agreement is the same; the bargaining unit is the same; the locality of employment is the same; and, most importantly, the purpose of 1766's refusal to cross the 1759 picket lines was not to coerce Cedar into conceding an issue to Local 1759 which was not arbitrable; rather, the purpose of the 1766 strike was to coerce Cedar into conceding an issue to Local 1759 which was admittedly arbitrable. We also bear in mind that under the two-tier arbitration provisions of the collective bargaining agreement, Article XXIII, the award in the 1759 case apparently would affect also Local 1766, for there are only three grounds of appeal to the Arbitration Review Board: that the decision of a panel is in conflict on the same issue with other panels; that the decision involves a new question of a substantial contractual issue; and that the panel decision is arbitrary, etc.
>
> We think, then, that since the purpose of the strike of Local 1766 was to compel Cedar to concede an arbitrable issue to Local 1759, with the same employer, the same collective bargaining agreement, the same bargaining unit, and the cause of Local 1759 made its own, that the *Buffalo Forge* exception to *Boys Markets* should not apply, ..." (Decision, pp. 57-58)

Third, however, the Court below refused to apply the same reasoning to the strike of Local 1949 of Southern Ohio Coal, holding instead that the District Court was correct in denying a preliminary injunction.

The reason for the distinction is unclear, and the only significant missing element as to Local 1949 was that its strike involved a different employer.

We submit, however, that where all the other distinguishing features enumerated by the Court below are present, it is immaterial whether the employer being picketed and struck in pursuit of a common cause is the same or a different employer.

The critical factors, in our opinion, are the other ones enumerated by the Court below, and they apply to Local 1949 as well as to Local 1766. They are: the same collective bargaining agreement; the same bargaining unit; the purpose of coercing Cedar Coal (and indeed the entire BCOA membership) into conceding on an arbitrable issue; and the same impact of the resolution of the particular issue on all BCOA members and all UMWA members because of the unitary arbitration system.

In short, whether or not the same Company (or as mentioned by the Court below, the same locality) is involved, all of the local Unions who went on strike were engaged in a transparent conspiracy and an orchestrated, concerted work stoppage designed to force

the industry to capitulate to the Union's interpretation of a specific provision of the 1974 Agreement. Nothing could be more clearly designed to thwart and undermine the arbitration process.

It is not possible to construe the decision of the court below as not intended to limit the use of injunctions to strike activity at another mine or mines of the same *Company*. It may be that the lower court was merely reciting the fact that the three Cedar mines were commonly owned. In other words, given the evidence in the record showing that the members of Local 1766 were striking in support of Local 1759's "grievance", the Court below might have, and in our opinion should have, reached the same result, regardless of the common ownership of the Cedar Coal mines. However, if it was the intent of the court below to have this case turn on the presence or lack of common ownership, the decision is not only illogical, but also ineffectual.

The Arbitration Review Board under the 1974 Agreement has dealt with basic elements of the same issue. In Decision No. 108, issued on October 10, 1977, the Arbitration Review Board stated:

> ". . . we do not believe that a distinction can properly be drawn between the picketing of an employee's own mine and the picketing of other mines, be they mines of the employee's Employer or mines of another Employer. [footnote omitted] . . . . the problem with drawing a distinction between an employee's own mine and other mines is that it would permit Miners, covered by one and the same Agreement, to enter into 'you picket my mine and I'll picket your mine' mutual-aid pacts, as we said in Decision 105."

We submit that the Court below gave too restrictive an application to *Buffalo Forge;* and that in the interests of stability of labor relations in the bituminous coal industry and in the interest of clarifying the rule of law, the Court should grant *certiorari* in this case.

BCOA submits that in this type of case, injunctive relief is clearly appropriate as a legal matter and is essential: (1) to preserve the integrity of the Agreement; (2) to protect the Health and Retirement Funds; (3) to secure an adequate supply of coal; and (4) to prevent chaos in the bituminous coal fields. We further submit that court relief is not prohibited by the *Buffalo Forge* ruling, but is sanctioned by *Boys Markets.*

Boys Markets Provides the Legal Basis for Injunctive Relief and *Buffalo Forge* Does Not Preclude It

The holding of the Supreme Court in *Boys Markets* is well known and, prior to *Buffalo Forge,* was frequently applied to wildcat strikes in the coal fields. *Boys Markets* holds that where there is a labor contract in effect containing a binding grievance and arbitration procedure, there arises an implied agreement not to strike over an arbitrable dispute. In the event such a strike does occur, the federal courts are empowered to enjoin such strikes and to order arbitration of the dispute.

The courts have frequently noted the scope and breadth of the grievance-arbitration clause of the 1974 Agreement. Article XXIII, Section (c) of that Agreement provided for grievance-arbitration of differences arising over matters not specifically mentioned in the Agreement; or local trouble of any kind. This clause was given a very broad scope by this Court in *Gateway Coal Company* v. *UMWA,* 414

U.S. 368 (1974). That case involved a safety issue; and this Court extended *Boys Markets* to an injunction enforcing the implied no-strike clause in the then existing 1971 National Agreement, although the question of arbitrability of a safety grievance was itself a "substantial question of contract interpretation." 414 U.S. at 380-384. See, footnote 14 in Mr. Justice Stevens' opinion in *Buffalo Forge.*

BCOA submits that *Boys Markets* is applicable here. There was admittedly an arbitrable dispute at the original mine. Roving pickets fanned out from there throughout the industry, shutting down other mines, where the local unions in turn went on strike.

When other UMWA local unions such as those of Southern Ohio Coal Company are picketed and then cease work, their actions are plainly designed to aid and abet the cause of the local union at the originating mine, (in this case, Cedar Coal) and to cause the dispute to be settled by economic force and thus to frustrate and undermine the arbitration process. As this Court said in *Buffalo Forge:*

> "The driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties."

In giving approval to *Boys Markets* in *Buffalo Forge,* the Court stated further that,

> "Striking over an arbitrable dispute would interfere with and frustrate the arbitral process by which the parties had chosen to settle a dispute. The *quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery." 96 S.Ct. 3141, 3147 (1976)

It seems quite clear that the force and effect of the actions of the Local 1766 at Cedar Coal and Local 1949 at Southern Ohio Coal were to join hands with the roving pickets emanating from Local 1759 of Cedar Coal in an effort to compel the original employer (Cedar Coal Company) to capitulate to the Union on an arbitrable (and arbitrated) dispute. Therefore, all locals engaging in and joining this concerted effort breached their implied obligation not to strike over an arbitrable dispute, and should have been subject to injunction under *Boys Markets.*

Distinctions from *Buffalo Forge*

The majority of this Court in *Buffalo Forge* pointed out the features of that case which differentiated it from *Boys Markets* and which are applicable here. The Court stated:

> ". . . The District Court found, and it is not now disputed, that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it were subject to the settlement procedures provided by the contract between the employer and respondents. *The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."* [emphasis added]

The situation presented here is wholly distinguishable from *Buffalo Forge.* Overriding all else, the essential difference between *Buffalo Forge* and this case is the one emphasized by this Court in the above quo-

tation. In *Buffalo Forge,* the strike had neither the purpose nor effect of evading an obligation to arbitrate or of depriving the employer of his bargain. In this case, that was the whole purpose of the strike and the accompanying picketing.

The conclusion seems inescapable that all UMWA locals which went on strike in response to roving pickets were direct parties in a concerted effort to gain by force, rather than by submission to arbitration, their interpretation of the National Agreement. Thus, the purpose and effect of the activities of all those locals was to evade the contractual obligation to arbitrate.

Not even superficially can it be said that this was a "sympathy strike" within the meaning of *Buffalo Forge.* This is not a case where one union with a separate agreement in a separate employee bargaining unit respects the picket lines of another union negotiating for a separate agreement in a separate employee unit. In such a case, there is no arbitrable dispute other than the sympathy strike itself. That was the situation in *Buffalo Forge.* The union engaging in the sympathy strike had no *direct* interest in the dispute between the striking union and the employer.

Here, all UMWA locals and their members were parties to the same National Agreement, negotiated between BCOA and UMWA "on behalf of its members". They had a direct unity of interest in any underlying dispute involving the meaning and application of any of the terms of their identical agreement. They stood to gain or lose equally from the arbitration of the issue, and to gain or lose equally from resolution of the issue by engaging in a wildcat strike. This was so because interpretation of the 1974 Agreement was a

matter in which the members of BCOA and UMWA had an identical and direct interest. The arbitrator's ruling at one mine favorable to one grievant could benefit the members at all mines; and an unfavorable ruling could equally be detrimental to them. An enforced settlement by the use of economic force has exactly the same effect.

1. Here the underlying dispute was arbitrable.

The issue at the Grace Mine No. 3 as to whether the job in question was a "classified" (meaning Union) job or a non-classified job turned on the application of a specific provision of the 1974 Agreement which was applicable to all BCOA members and all UMWA members.

This situation is thus essentially different from that in *Buffalo Forge* where, as the Court pointed out, there was *no underlying dispute* "that was even remotely subject to arbitration." Here, every member of BCOA and every member of the UMWA had a direct interest in the resolution of the Cedar Coal dispute which was the "underlying dispute" giving rise to this entire work stoppage.

2. Here the original strike was illegal.

Another distinction is that in *Buffalo Forge* the union originally on strike was engaged in a *legal,* primary strike and primary picketing. Here, the original strike was *illegal* and in violation of the 1974 Agreement. It would be paradoxical to find that the original strike was an enjoinable one, but that the strikes by other locals in aid of the same unlawful objective were lawful and unenjoinable.

3. Here there is a single bargaining unit and agreement.

Moreover, BCOA believes that the application of *Buffalo Forge* must be considered in the context of the collective bargaining relationships which exist in the bituminous coal industry.

In *Buffalo Forge* there were two separate locals representing two separate "bargaining units". One was striking to obtain its own separate agreement. The other struck in sympathy.

By contrast, all bituminous coal miners employed by members of BCOA are members of a ***single multi-employer bargaining unit***. The employers in that bargaining unit are all the members of BCOA. All UMWA miners employed by members of BCOA are covered by a single national agreement containing identical terms and conditions applicable to all of them. The Agreement is a national agreement negotiated between BCOA and the International Union.

The terms of the National Agreement apply alike to all members of UMWA employed by BCOA members; likewise their employers were all mutually bound to respect and to follow the common grievance-arbitration procedures. They also all were bound by Article XXVII, to ". . . maintain the integrity" of the agreement.

Vital to maintaining this "integrity" was the pledge to abide by the grievance-arbitration procedures for settling disputes. As members of the same bargaining unit covered by the same national agreement, each BCOA member and each UMWA member had an obligation to uphold the agreement and a duty not to engage in lockouts, in strikes, or in picketing over any dispute, no matter at what mine or what Company the

dispute arises, so long as that underlying dispute is arbitrable.

If the situation were one in which there were a single plant-wide unit and contract, it would make no sense to say that the employees in Department A who struck over an arbitrable grievance *could be* enjoined under ***Boys Markets,*** but that the employees in Department B who went out in "sympathy" *could not*. Clearly, in such a situation, the entire strike in a single bargaining unit would be enjoinable under ***Boys Markets***.

Conceptually, although on a larger scale, the case just hypothesized is the situation between BCOA and the members of the UMWA under the 1974 Agreement. There is one national contract and one national bargaining unit. The miners at each individual mine of member companies may and do belong to various local unions. They have their own seniority lists and initiate their own grievances. But these locals do not constitute separate bargaining units. Their wages, hours, conditions, benefits, and seniority rights are negotiated between BCOA and UMWA and are derived from the one national agreement. Their grievances are processed under that agreement. Indeed, grievances go in progressive steps from the local to the District level and then to arbitration before panel arbitrators selected by BCOA and UMWA under the National Agreement.

Moreover, in the 1974 Agreement, for the first time, a provision was made for a National Arbitration Review Board which functions as the final arbiter of all disputes. The professed purpose and effect of this National Board was to bring about uniformity in the interpretation and application of the agreement. It is significant that several panel arbitrators and the Arbi-

tration Review Board itself have ruled on the legality of roving pickets under the 1974 Agreement, and have condemned them as violative of the essence of the 1974 Agreement.

Given the existence of a single agreement in a single multi-employer bargaining unit, and an arbitration procedure designed to insure conformity of interpretation, BCOA submits that all members of the Union employed by members of BCOA are mutually bound to abide by the common grievance arbitration procedures. In this unitary relationship, the concepts of "primary" strikes and "sympathy" strikes simply do not apply. These terms connote separateness of unions and bargaining units, and separateness of interests which do not exist here. All coal miners and all members of BCOA have a direct interest in the disputes of all other miners. Because of this close parity of interest in the outcome of any contractual dispute, *Buffalo Forge* is clearly inapposite, and *Boys Markets* should govern.

CONCLUSION

The simply stated principle embodied in the National Bituminous Coal Wage Agreement of 1974 was that *both parties* should "maintain the integrity of the agreement" during its term, recognizing that at periodical intervals there may be legal strikes or lockouts over the terms of a new agreement. A part of this mutual obligation during the contract term was the obligation of both parties to use the grievance-arbitration procedures of the agreement to resolve disputes. This left no room for wildcat strikes and their spreading by roving pickets to force the employer to

adopt the Union's unilateral interpretation of the agreement.

Otherwise, the concept of an agreed period of labor peace under an agreement for a fixed term becomes illusory.

For the above reasons, BCOA supports the Petition for a Writ to consider the issue of the application of *Buffalo Forge* to the situations presented in these cases.

Respectfully submitted

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